



00062015

# **Provincial Offences Act**

**1979**

**JUSTICES OF THE PEACE**

**Instructional Manual**

**Prepared For:**

**Justices of the Peace Training  
Programme**

**Court Held: January-March 1980**

KF            Justices of the peace instructional  
9620        manual : the Provincial offences act,  
ZB3          1979.  
J88  
1980

KF            Justices of the peace instructional  
9620        manual : the Provincial offences act,  
ZB3          1979.  
J88  
1980

MINISTRY OF THE  
ATTORNEY GENERAL  
LAW LIBRARY

MINISTRY OF THE  
ATTORNEY GENERAL  
LAW LIBRARY

**Provincial Offences Act**

**1979**

**JUSTICES OF THE PEACE**

**Instructional Manual**

**Prepared For:**

**Justices of the Peace Training  
Programme**

**Court Held: January-March 1980**



Digitized by the Internet Archive  
in 2018 with funding from  
Ontario Council of University Libraries

[https://archive.org/details/mag\\_00062015](https://archive.org/details/mag_00062015)

JUSTICES OF THE PEACE

INSTRUCTIONAL MANUAL

THE PROVINCIAL OFFENCES ACT, 1979

Ministry of the Attorney General





Ministry of the  
Attorney  
General

PREFACE

This manual has been prepared as a supplement to lecture material that will be presented at educational programmes for Justices of the Peace in January, February, and March, 1980. The material should also serve as a basic reference for judicial officers in the exercise of their duty in proceedings under The Provincial Offences Act, 1979.

These materials have been adapted from a previous text: The Instructional Handbook for Justices of the Peace, which was prepared by His Honour Judge Charles Scullion, Provincial Court (Criminal Division); and, Mr. Ian Scott, law student.

Mr. David Beck, student-at-law, Ministry of the Attorney General, greatly assisted in the preparation of the present manual. Messieurs Archie Campbell, Q.C., Assistant Deputy Attorney General; Douglas Drinkwalter, Q.C., Crown Attorney, County of Norfolk; Larry Owen, Assistant Crown Attorney, County of Halton; and, Mr. David Spring, Counsel, Ministry of the Solicitor-General, provided editorial assistance in the preparation of the materials. Ms. Richelle Kosar patiently and diligently typed the manual.

David Hunter  
Executive Coordinator  
Provincial Offences Act  
Implementation  
Toronto  
December, 1979



## TABLE OF CONTENTS

	Page
Introduction	i
I. ESTABLISHMENT OF PROVINCIAL OFFENCES COURTS	1
Introduction - Creation of the Provincial Offences Court - Residual Power - Contempt of Court	
II. COMMENCEMENT OF PROCEEDINGS UNDER PART I OF THE ACT	5
Introduction - Commencement of Proceedings by Certificate of Offence - Filing the Certificate of Offence - The Summons under Part III of the Act - The Options Available to the Defendant When an Offence Notice is Used - Procedure under Section 7 - Jurisdiction of Justices to Accept Guilty Pleas with an Explanation - Failure to Respond to Offence Notice - Reopening on Failure of Notice - Penalties - Regulations - The Repeal of <u>The Summary Convictions Act</u>	
III. ARREST, BAIL, AND SEARCH WARRANTS	29
Arrest - Bail:Introduction - Recognizances - Search Warrants: Introduction - Issue of a Search Warrant - Information for Search Warrant - The Search Warrant Itself - Execution of Search Warrant - Territorial Jurisdiction	
IV. COMMENCEMENT OF PROCEEDINGS UNDER PART III OF THE ACT	62
Introduction - Commencement of Proceeding by Information - Laying the Information - The Counts in an Information - Service of the Summons - Summary - Proper Court -	
V. THE CONCEPT OF MENTAL DISORDER	78
Introduction - Section 45 and Comments - Mental Disorder Defined - Medical Evidence - Courtroom Conduct of Defendant - Statement of Reasons - Jurisdiction - Referring the Matter to a Judge - Continuation of Suspended Proceedings - Appeals	



VI.	THE TRIAL	87
	Powers of Amendment - Costs - Provisions Governing the Conduct of a Trial - Witnesses - Penalty for Failure to Attend - Commission Evidence - Taking the Defendant's Plea - Evi- dence at the Trial - Prosecutors and Defen- dants - Failure of Prosecutor to Appear - Conviction <u>ex parte</u> - Included Offences	
VII.	SENTENCING POWERS AND PROCEDURES	112
	Introduction - Specific Provisions - Pro- bation - Procedures in Default of Payment of Fine: Introduction - Remedying the Mischief - Civil Enforcement - Imprisonment	
VIII.	THE EXERCISE OF JUDICIAL DISCRETION	133
	Introduction - Definition - When Judicial Discretion is Available - When Discretionary Powers are not Available - Use of Discretionary Powers	
IX.	APPEAL AND REVIEW IN <u>THE PROVINCIAL OFFENCES</u> <u>ACT, 1979</u>	138
	Introduction - Appeals under Part III - Ap- peals under Part I and Part II - Rules for Appeals - Review - Other Appeal Provisions - Chart	
	Index	167



## INTRODUCTION

The Provincial Offences Act, 1979, delegates more jurisdiction to the justices of the peace than they formerly had under the Criminal Code and The Summary Convictions Act provisions. The purpose of this manual is to provide guidance to the justices in a number of these new areas. Justices of the peace will now generally conduct all matters except those which, by their gravity, call for the attention of a provincial court judge. While all of the sections of the Act are not canvassed, those in which the justices will be most heavily involved are.

The Provincial Offences Act was enacted to remedy a number of procedural problems that arose because provincial offences were prosecuted under a code of procedure adopted by reference to the Criminal Code. Although the adopted procedure was the less rigid and formal of the two systems established in the Code, it was still steeped in centuries of assumptions about crimes and the persons who commit them. Neither these assumptions nor the rigid technicalities they engendered were appropriate for the 90% of provincial offences intended to regulate activities which are not only legal but also useful to society.

The Provincial Offences Act creates a clear, self-contained procedural code to simplify procedures, eliminate technicalities, enhance procedural rights and protections and remove the obstacle of delay from the assertion of rights and the conclusion of prosecutions. In addition, the Act promotes the replacement of jailing persons who do not pay their fines with effective means for collecting those fines.

The Act brings flexibility to the defendant's options; as well as being entitled to a full trial, a defendant may drop into a designated court office, without prior arrangement, to plead guilty before a justice and seek time to pay the fine or offer an explanation in mitigation of the set penalty.



The Act seeks to distinguish minor, regulatory offences from more serious offences such as environmental protection offences and careless driving. It creates two procedural streams, one commenced by a certificate of offence, and the other commenced by an information. The former procedure is more simplified, and can be applied to most offences for which a relatively small fine is provided. The more formal procedure applies where the complainant swears an information, and a summons or warrant is issued to bring the defendant before the court.

Along with the enactment of The Provincial Offences Act, the legislature has amended The Provincial Courts Act, thereby creating a new court called the Provincial Offences Court. It will hear and determine all trials of provincial offences. In many centres, there will be a physical separation of the Provincial Offences Court from the provincial court (criminal division) in which trials of provincial offences are now held together with criminal offence trials. The anticipated long-term result is the creation of an atmosphere in the Provincial Offences Court which is more informal and less legalistic than the criminal division court.

This manual will not be dealing with two of the concepts expressed in the Act: Dispute without Appearance (s. 6) and Proceedings for Parking Infractions (Part II). Neither provision will be coming into force when the rest of the Act is implemented. At a later date, this manual will be expanded to detail these two sections.



## I. Establishment of Provincial Offences Courts

### Introduction

The Provincial Courts Amendment Act, 1979, complements The Provincial Offences Act by creating the Provincial Offences Court; it vests jurisdiction to try all provincial offences in those Courts. Certain other provisions of this Act will apply generally to all divisions of the provincial courts (criminal, family, and provincial offences), but they are discussed here only as they affect provincial offences.

### Creation of the Provincial Offences Court

The new court has jurisdiction over the trial of all provincial offences. Now, persons charged with provincial offences will not generally find themselves sharing court rooms with persons accused of criminal offences.

In most cases, the court will operate without the addition of new facilities and personnel; in fact, the overall demand for personnel and facilities will likely be reduced by the trial alternatives established in The Provincial Offences Act.

The distinction between provincial and criminal offences will generally be brought about by designating certain court rooms as Provincial Offences Courts, or by convening the Provincial Offences Court on certain days of the week in a court room used for criminal matters on other days. However, since in some circumstances it will be necessary to put provincial offence charges on the same court list as criminal or family matters, the Act permits these cases to be heard without any formal redesignation of the court.

The distinction which will be made between the trials of provincial offences and criminal offences is expected to encourage an atmosphere in which the former can be treated with much less rigidity and formality than trials of criminal of-



fences. It is hoped that all persons involved in the trials of provincial offences - judges, justices of the peace, defendants, counsel, agents, and court personnel - will, over time, become infused with this distinction, and reflect it in their approach to provincial offences.

The Provincial Offences Court will ordinarily be presided over by justices of the peace, who will be acting under the general supervision of a judge of the provincial court (criminal division). These judges will preside in Provincial Offences Court when serious cases are being tried. A number of provisions of The Provincial Offences Act, most notably the new appeal procedures are designed to strengthen and enhance the supervision of justices of the peace by the provincial judges. They will also ensure that a defendant can, by appealing, take the matter before a judge, in a quick and inexpensive manner.

#### Residual Power

In another move away from the rigidities of criminal procedure, section 9(1)(a) of The Provincial Courts Act vests in the court the power to take the necessary procedural steps where the procedural code contains a gap, or fails to have contemplated a novel fact situation. This is designed to facilitate the effective enforcement of laws and assertion of rights by eliminating the extreme procedural inflexibility which may now impede these goals.

The power is a narrow one; its intent is to give the court the power to take necessary steps in the absence of express statutory procedural provisions, without affecting the present balance of responsibilities within the administration of justice. The power puts elasticity in the procedural legislative amendments. It has also permitted The Provincial Offences Act to be drafted without the great amount of procedural minutiae which has characterized the Criminal Code.



The intent is to ensure that once a prosecution is properly before a court, the matter will be fairly determined on its merits; the courts are assisted by this provision to attain that goal.

#### Contempt of Court

As the Provincial Offences Court will be a court of record, the judicial officers who preside in it will have certain powers to deal with contempt committed in the fact of the court. Recognizing this, and wishing to control and regulate that contempt power, the Act sets out a detailed procedural structure for its exercise.

The basic thrust of these procedural provisions is to ensure that in all but extreme cases, contempt of court will be dealt with by a judge. As well, a cooling-off period is built into the contempt procedure, to ensure that as a general rule the matter is considered dispassionately rather than in the heat of the moment. Only where order and control in the court room could not be maintained if the contempt hearing were adjourned may the presiding judicial officer deal with it immediately. When this is done, the quick, informal review process of The Provincial Offences Act will be available to the person whose contempt has been punished.

The Act requires that a person found to be in contempt of court be given an opportunity to show cause to the court why he or she should not be punished. The punishment for contempt is limited to a fine of not more than \$1,000, or to imprisonment for not more than 30 days, or to both. Where the person found in contempt is acting as an agent, he or she may additionally be barred from continuing to act as agent in that proceeding.

The Act does not empower the court to deal with contempt



committed outside of the court, the power to deal with these contempts being left in the Supreme Court of Ontario. However, if someone who is outside the court room is deliberately and without reasonable excuse disturbing or interfering with proceedings then he or she may be charged with an offence. This offence would be prosecuted in the same manner as any other alleged infraction of provincial law.

The offence is intended to deal with situations as disparate as a gang of bikers chanting obscenities outside a court room window on the one hand, and a jack hammer operator in search of the source of a gas leak on the other. Both must know that their activities are actually disturbing or interfering with the court before they commit an offence, but the jack hammer operator has the right to continue his activities if it is reasonable for him to do so. The provision thus attempts to protect the integrity of the court's procedures without being unduly restrictive.



## II. Commencement of Proceedings under Part I of the Act

### Introduction

The Provincial Offences Act attempts to classify offences into three categories: minor, regulatory, offences for which the penalty imposed is a fine of less than three hundred dollars; parking infractions; and more serious offences requiring the laying of an information. This section of the manual deals with commencement of proceedings under Part I (by Certificate of Offence). Part II (Parking Infractions) will not be dealt with because the new procedure for this offence will not be in force until 1981.

### Commencement of Proceedings by Certificate of Offence

3.—(1) In addition to the procedure set out in Part III for commencing a proceeding by laying an information, a proceeding in respect of an offence may be commenced by filing a certificate of offence alleging the offence in the office of the court named therein.

(2) A provincial offences officer who believes that one or more persons have committed an offence may issue, by completing and signing, a certificate of offence certifying that an offence has been committed and,

- (a) an offence notice indicating the set fine for the offence;
- or
- (b) a summons,

in the form prescribed under section 13.

(3) The offence notice or summons shall be served personally upon the person charged within thirty days after the alleged offence occurred



(4) Upon the service of an offence notice or summons, the person charged shall be requested to sign the certificate of offence, but the failure or refusal to sign as requested does not invalidate the certificate of offence or the service of the offence notice or summons.

(5) Where service is made by the provincial offences officer who issued the certificate of offence, he shall certify on the certificate of offence that he personally served the offence notice or summons on the person charged and the date of service.

(6) Where service is made by a person other than the provincial offences officer who issued the certificate of offence, he shall complete an affidavit of service in the prescribed form.

(7) A certificate of service of an offence notice or summons purporting to be signed by the provincial offences officer issuing it or an affidavit of service under subsection 6 shall be received in evidence and is proof of personal service in the absence of evidence to the contrary.

(8) The provincial offences officer who serves an offence notice or summons under this section shall not receive payment of any money in respect of a fine, or receive the offence notice for delivery to the court.

The procedure under section 3 is conceptually similar to the procedure currently in use with respect to the summary conviction ticket. The concept which is continued here is that a person who is given an offence notice at the time and place of the offence need not be given as much written detail concerning the offence as the person who first learns of the charge some time later. The ability to resolve the matter by delivering a fine to the court by mail or otherwise reflects the minor regulatory nature of the offences for which the notice procedure will be used. The principal alteration from the existing procedure is the elimination of a sworn information where the procedure is used. As well, at the time the officer completes the



certificate, he may give the defendant a summons rather than the offence notice, if no fine has been set for the offence or if the circumstances of the alleged offence require a hearing.

A summons commands the defendant to appear in court for the trial of the offence; failure to do so invokes the procedures set out in section 55, which may lead to a conviction in his absence or the issuance of a warrant for his arrest.

Under subsection (2), the Certificate of Offence must be signed by the provincial offences officer. At this point, it should be noted that section 1(1)(i) of the Act defines a "provincial offences officer" as a police officer or any other person or class of persons designated in writing by a minister of the Crown.

Therefore every police officer in Ontario may use the certificate of offence procedure. The officer must complete and sign the Certificate of Offence certifying that the offence has been committed; he must issue either an offence notice or a summons. Under subsection (2)(a), if an offence notice is used, the fine set by the court will be shown on its front. The amount of the fine under Part I is subject to the limitations in section 12, which states that it cannot exceed the maximum prescribed for the offence, or \$300, whichever is the lesser.

Under subsection (2), the officer need only "believe" that an offence has been committed. Thus, he does not have to have either personal knowledge or reasonable and probable



grounds to commence the proceedings.

Under subsection (3), the offence notice or summons must be served personally within thirty days after the alleged offence occurred. If more than thirty days have elapsed, the officer may proceed to lay an information under Part III, provided that he acts within the limitation period for the offence. Refer to section 76 concerning limitation periods.

Under subsection (4), the person who is served must be requested by the officer to sign the certificate of offence. This provision is designed to minimize disputes about service of the offence notice or summons. However, if the person charged refuses to sign, this does not invalidate the certificate and the service is completely valid.

#### Filing the Certificate of Offence

4. A certificate of offence shall be filed in the office of the court named therein as soon as is practicable after service of the offence notice or summons.

Filing the certificate in the court office commences proceedings, and therefore is the crucial date as far as limitation periods are concerned. A certificate of service under s. 3(5) must be filed with the certificate of offence.



It is important that officers file the certificate of offence as soon as they reasonably can, so that it will be available for a justice when a defendant appears to plead guilty with an explanation.

As an alternative to the offence notice, the officer may give the person who committed an offence a summons under Part I. This would be necessary in circumstances where there is no set fine for the offence, or where it is desired to have witnesses give evidence about the incident. The summons under Part I will command the person charged to appear at a certain date in the appropriate court. It must contain all the required information concerning the offence, and must be signed at the bottom by the officer who serves it. The serving officer may be someone other than the officer who completed the certificate of offence, in which case an affidavit of service must be completed. The certificate of offence cannot be filed until the offence notice or summons has been served.

It is important to note that when an officer serves a defendant, he is prohibited by section 3(8) of the Act from receiving any money as payment for the fine, or from receiving the offence notice from the defendant for delivery to the court. An officer cannot act as an agent for the defendant.



The Summons under Part III of the Act

In addition to the summons under Part I, which will be used very infrequently, a provincial offences officer may commence proceedings under Part III by issuing a summons at the very time and place where an offence is committed.

23. Where a provincial offences officer believes, on reasonable and probable grounds, that an offence has been committed by a person whom he finds at or near the place where the offence was committed, he may, before laying an information, serve the person with a summons in the prescribed form.

This permits an officer to commence proceedings expeditiously without having to return to his office, prepare an information, appear before a justice, and then return to serve the summons on the defendant. The procedure is substantially similar to the Criminal Code procedure of issuing an appearance notice instead of arresting an offender on the spot. The officer must subsequently lay an information under oath before a justice, who will either confirm the summons (s. 25(1)(a)(i)), or cancel it (s. 25(1)(b)(ii)).

Finally, an officer may follow the usual practice of laying an information before a justice under section 24. The justice may then issue a summons, issue a warrant for the arrest of the defendant, or refuse to issue process



if he considers that the case for doing so has not been made out.

Therefore, there are three types of summons which may be used under the Act: the Part I summons used with the certificate of offence; the Part III summons issued on the spot; and the Part III summons used after an information has been laid. Those under Part III must be used in conjunction with an information, which makes available the full range of penalties which the law provides, rather than the restricted penalties under Part I. The Part III procedure will be discussed in detail in a later chapter of this manual.

The Options Available to the Defendant When an Offence Notice is Used

1) The Plea of Not Guilty

When the defendant has been given an offence notice, he must proceed to decide what action he will take concerning the charge. If he wishes to plead not guilty, section 5 requires that he must sign the plea of not guilty on the offence notice and indicate his intention to have a trial, and then deliver the offence notice to the court office specified in the notice or have it delivered within fifteen days. The clerk of the court will then set a time and date for trial and give notice to the defendant and the prosecutor.

2) The Plea of Guilty with Representations

: Prior to The Provincial Offences Act, pleas of guilty with an explanation were not permitted by the law. Under



The Summary Convictions Act, an offender probably would have appeared at court and entered a plea of not guilty. This would have necessitated a full trial, so that the accused could explain his mitigating circumstances.

7.—(1) Where an offence notice is served on a defendant and he does not wish to dispute the charge but wishes to make submissions as to penalty, including the extension of time for payment, he may attend at the time and place specified in the notice and may appear before a justice sitting in court, for the purpose of pleading guilty to the offence and making submissions as to penalty, and the justice may enter a conviction and impose the set fine or such lesser fine as is permitted by law.

(2) The justice may require submissions under subsection 1 to be made under oath orally or by affidavit.

By offering the offender a plea of guilty with an explanation, it is hoped that a significant number of offenders will exercise this option and reduce the volume of trials and the cost of requiring a trial. Both expenses and loss of time will also be reduced for the defendant, who will be less inclined to engage counsel or an agent if he intends only to dispute the amount of the fine or seek time to pay it.

Pleas of guilty with an explanation have already been implemented in the experimental North York Traffic Tribunal in Metropolitan Toronto. Offenders against traffic regulations within the borough of North York are permitted to introduce a plea of guilty with an explanation on a drop-in



basis. This is the system which will be used throughout the province under The Provincial Offences Act. The defendant will appear informally before a justice of the peace, enter his guilty plea, and then make his explanation or request additional time to pay the fine. If the justice is satisfied that the defendant did commit the offence, he or she will enter a conviction, and then consider the explanation in assessing the penalty. The fine that the justice imposes cannot exceed the amount set for out-of-court payment, but the justice may impose a lesser fine. Not only will the system result in tremendous savings to the province, since it eliminates the need to schedule and hold a trial or to bring witnesses, but the defendant will benefit by not being required to miss work.

Subsection (1) of section 7 states that the defendant may plead guilty only at the time and place specified in the notice. In larger urban areas, it is anticipated that a defendant would be able to "drop in" to plead guilty with an explanation anytime during regular office hours, as well as some evenings. In outlying areas, the court may restrict the available hours by noting specific hours on the offence notice.

Subsection (2) is designed to discourage abuse of the guilty plea with an explanation procedure by permitting the justice to require submissions under subsection (1) to be made under oath. Section 86 provides that the penalty



for making a false statement in writing is a fine of not more than \$1,000.

Procedure under Section 7

In general, Section 7 should be interpreted in the light of the overall objectives of the Act; that being an attempt to add flexibility to the defendant's options and to reduce the enormous costs of holding criminal-style trials in all cases in which the defendant has not mailed in his fine.

(1) The defendant may enter a plea of guilty with representations at the time and place specified in the notice. He may also request an adjournment, or send an agent to appear on his behalf.

(2) Upon his arrival at the Provincial Offences Court, the defendant reports to the receptionist and advises him of his intention to plead guilty with an explanation, states his name and hands his offence notice to the receptionist.

(3) The defendant cannot plead guilty with an explanation if he has been issued a summons.

(4) The defendant must have the offence notice with him in order for the court to refer to the certificate of offence which has been filed.

(5) The defendant and the relevant certificate of offence are then taken to the Provincial Offences Court.

(6) The justice of the peace need not advise the defendant of the legal consequences of a plea of guilty with an explanation. His duty is solely to satisfy himself as to the guilt of the defendant.



(7) It is the responsibility of the presiding justice to see that the accused is in a position to hear and understand the charge and to watch for a situation where an interpreter is required.

(8) If the defendant indicates that he does wish to plead guilty, the justice then reads the charge to the defendant who pleads guilty and offers his explanation to the justice.

(9) The justice must be satisfied that the defendant committed the offence before he registers a conviction.

(10) The plea of guilty should be in clear and unambiguous terms and, if not, the justice of the peace may refuse to accept his plea. The justice should deal, first, with the guilty plea itself, and, second, with the explanation. These two procedures should be distinct so that it is clear to both the defendant and the justice that the ensuing explanation serves only to mitigate the sentence and not to dismiss the charge.

(11) If the justice refuses to accept the guilty plea, he should ask the defendant to enter a plea of not guilty on the offence notice. The justice may then accept the not guilty plea and advise the defendant that a trial date will be set. When the offence notice is received, the clerk of the court shall, as soon as is practicable, give notice to the defendant and prosecutor of the time and place of trial. Refer to s. 5(2) of the Act.

If the defendant refuses to sign the not guilty plea, then the justice should simply advise him that no trial date will be set, and that a conviction will be entered in his absence after the fifteen day period has expired.

(12) If there are separate counts on the certificate



of offence, there should be separate pleas to each count:

R. v. Boyle (1954), 38 C.A.R. 111.

(13) A plea of guilty is admission of all of the essential elements of the offence.

(14) The justice of the peace has a discretion to permit a plea of guilty to be withdrawn and a plea of not guilty to be substituted prior to the judgment: R. v. Thibodeau, (1955) S.C.R. 646; R. v. Poole, (1974), 27 C.R.N.S. 63 (B.C.S.C.). This discretionary power is particularly useful if the defendant, during the course of his explanation of the mitigating circumstances, changes his mind about his original guilty plea or convinces the justice of the peace that he did not actually commit the offence. The Court's right to permit withdrawal of a guilty plea is not limited to matters arising from "admitted facts" but can be based upon any statements made in the course of the inquiry following a guilty plea: Adgey v. The Queen (1973), 13 C.C.C. (2d) 177 (S.C.C.). In such a situation, the justice should point out to the defendant that in fact he wishes to plead not guilty.

(15) Section 7 only governs the situation where the defendant "does not wish to dispute the charge;" the justice does not have the discretion of accepting a plea to a lesser included offence. This is because under section 46(4) the consent of the prosecutor is needed before the court can accept a plea of guilty to any other offence. The prosecutor is not present at a plea of guilty with an explanation.

(16) A defendant may plead guilty with an explanation by counsel or agent. Refer to s. 51 and s. 82. However, if the justice feels that it is necessary for the defendant to appear in person, he may adjourn the hearing.



(17) After entering a conviction, the justice has the discretion to impose the set fine or such lesser fine as is permitted by law.

(18) Factors in determining the fine may include the offender's previous convictions, the credibility of his explanation, the extent of personal damage caused by the offence and the offender's demeanour. The justice may wish to test the credibility of the defendant's explanation, but he should try to avoid entering the arena of cross-examination.

(19) If the defendant has the means of paying the fine immediately, and a court clerk is available, the defendant should be directed to pay his fine. If the clerk is not available or the defendant does not have the cash or equivalent on hand, the defendant should be given some time to pay. Under no circumstances should the justice accept money from the defendant.

In sum, the general procedure regarding accepting a guilty plea with an explanation is the following:

1. The defendant may enter a plea of guilty with representations at the time and place specified in the notice.

2. If the defendant indicates that he does wish to plead guilty, the justice then reads the charge to the defendant, who pleads guilty and then offers his explanation.

3. The justice must be satisfied that the defendant committed the offence before he registers the conviction.

4. After entering a conviction, the justice has the discretion of imposing the set fine or such lesser fine as is permitted by law.

Jurisdiction of Justices to Accept Guilty Pleas with  
an Explanation

We are concerned with the powers of the justice of the peace, firstly, as to the statutory limitations and, secondly, as to



his geographical limitations. Statutory limitations to accept guilty pleas with an explanation are readily defined in the new Act; if the offence is provincial, and the defendant has been served with an offence notice under Part I, the justice has jurisdiction to hear this new plea.

Geographical limitations are defined by Section 6 of the Justice of the Peace Amendment Act, S.O. 1973, c. 149. If his appointment is made only for a particular county or district, his jurisdiction extends only within that county or district. If, however, he is appointed as a justice of the peace for the Province of Ontario, then the territorial jurisdiction of his appointment extends throughout the entire province. In addition, depending on the designation which the justice is given by the Chief Judge, his powers may be limited to dealing with only certain proceedings, such as bail hearings and search warrants.

A justice of the peace has no authority to act on any matter that arises beyond the limits of the territory within which he has jurisdiction in dealing with provincial court matters. For example, if an offence took place in the County of X and a justice of the peace is appointed to act within the County of Y, he has no jurisdiction to deal with the offence. Likewise, he would have no powers while physically outside of County Y to deal with any matter that arises even if it arose within the County of Y. This position has been upheld in several court decisions and is summarized in R. v. Coyne, (1917), 29 C.C.C. 216;

It requires no authority for the proposition that a magistrate may not sit and adjudicate upon any case in a locality beyond the limits of the territory within which he has jurisdiction. But the question is whether sitting within his territorial jurisdiction he can try an offence which is alleged to have been committed beyond his territorial jurisdiction. Apart from statutory provision it seems clear that he has no jurisdiction in such a case.



The plea of guilty with an explanation can, therefore, only be accepted in the place specified in the notice by a justice with authority to act in that particular county or district. If the defendant lives some distance away and does not wish to travel to the court to dispute the charge, he may of course act by his counsel or agent.



### 3) Payment out of Court

Under section 8 of the Act, if the defendant does not wish to dispute the charge, he may sign the plea of guilty on the offence notice and deliver both the notice and the amount of the set fine to the court office specified in the notice. This is the same procedure as the existing prepayment option with summary conviction tickets. The defendant must deliver the notice and the money or cheque within fifteen days. The question of what is meant by "delivery" will be discussed below.

### Failure to Respond to the Offence Notice

Prior to The Provincial Offences Act, proceedings in the default of any action by the defendant resulted in a trial in his absence. Yet a trial in the absence of the defendant, in which the prosecutor presented evidence which stood without challenge, afforded little real protection for a defendant; and, the cost of police time could be great.

The new Act borrows the concept of the default judgment used in civil matters, where failure to respond is deemed to indicate that the defendant does not wish to dispute the allegations made against him. The Act provides safeguards to guarantee the defendant a trial on the merits, if for some reason his notice of the desire



to have a trial fails to arrive at the court office, or if the notice of the time of trial fails to arrive at his address. See Section 11 below.

9. Where at least fifteen days have elapsed after the defendant was served with the offence notice and the offence notice has not been delivered in accordance with section 6 or 8 and a plea of guilty has not been accepted under section 7, the defendant shall be deemed to not wish to dispute the charge and a justice shall examine the certificate of offence and,

- (a) where the certificate of offence is complete and regular on its face, he shall enter a conviction in the defendant's absence and without a hearing and impose the set fine for the offence; or
- (b) where the certificate of offence is not complete and regular on its face, he shall quash the proceeding.

If the defendant does not choose one of the procedural options, or pay a set fine out of court within fifteen days of being given the offence notice, a conviction will be entered automatically, if the certificate is complete. The Act adopts this procedure for minor offences in place of the criminal law requirement that a trial in the absence of the defendant be held in all cases where the defendant does not appear to plead guilty or to have a trial. Under the Act, only where a defendant has indicated his intention to have a trial, but fails to appear at the time set for the trial, will a trial in the absence of the defendant be held.

This section attempts to resolve the previous problem of expensive and inconvenient trials held in the absence



of defendants who never intended to appear, while preserving the right of every person charged with a provincial offence to have a trial on the merits. The nature of these minor provincial offences, the analogy to civil procedure, the very small obligation a defendant is asked to assume, and the benefit to the administration of justice from such a system combine to outweigh the disadvantages of permitting a court to enter a conviction without a hearing.

If the certificate of offence is complete and regular on its face, the justice shall enter a conviction in the defendant's absence and impose the set fine. The penalties, which are limited under Part I, are set out in section 12.

If the certificate of offence is not complete and regular on its face, for instance, if the set fine has not been written in, or there is no date of the offence, the justice shall quash the proceeding. Therefore, it is very important for provincial offence officers to complete the certificate of offence carefully. The form of wording for most offences will be prescribed by regulation, as is the current practice for summary conviction tickets.



Reopening on Failure of Notice

11.—(1) Where the defendant has not had an opportunity to dispute the charge or to appear or be represented at a hearing for the reason that through no fault of his own the delivery of a necessary notice or document failed to occur in fact, and where not more than fifteen days have elapsed since the conviction first came to the attention of the defendant, the defendant may attend at the court office during regular office hours and may appear before a justice and the justice, upon being satisfied by affidavit in the prescribed form of such facts, shall strike out the conviction, if any, and give the person appearing a notice of trial under section 5 or proceed under section 7.

(2) Where a conviction is struck out under subsection 1, the justice shall give the defendant a certificate of the fact in the prescribed form.

If the defendant does not appear or is not represented because, through no fault of his own, the delivery of a necessary notice or document failed to occur in fact, the defendant may appear before a justice and state his case. This hearing must take place within fifteen days of the time the conviction came to the notice of the defendant. Please note that the determining period begins when the defendant actually receives notice, not when the conviction notice is sent from the court house.

The justice must be satisfied by a standard form affidavit that the defendant's testimony is true. If he is satisfied, then the justice shall strike out the conviction and give the defendant or his agent a notice of trial.

The phrase "through no fault of his own" places an



onus on the defendant to explain why he had not appeared. Defining "fault" in this situation is a problem about which the case law provides little guidance. In general, though, the phrase will usually be given a liberal interpretation, because the justice may only reopen the trial and may not register an acquittal at this stage.

The defendant may plead guilty at the hearing under section 7, provided he has responded within the prescribed number of days and provided that he has satisfied the justice through an affidavit that he did not receive his original notice or notice of trial through no fault of his own, or where his original plea of not guilty did not arrive at the court.

Where a conviction is struck out, the justice shall give the defendant a certificate of the fact in the prescribed form, permitting the defendant to attain the reinstatement of any licence or privilege which may have been suspended for non-payment of the fine, or under other provisions of The Highway Traffic Act. Refer to section 11(2).

Under section 87, it is presumed that a document which was sent by ordinary mail to the last known address of the defendant appearing on the record was in fact received. The defendant may rebut this presumption by showing that for some reason the document did not arrive, such as a local postal strike. If, however, a notice of trial did not reach a defendant because



he had moved and did not leave any forwarding address, then the justice would no doubt consider that this was the defendant's fault, and would refuse to reopen the matter.

Section 11 will also assist innocent persons who receive a notice of conviction and the fine imposed in their absence, because the real defendant has presented a lost or stolen driver's licence as identification when he was charged with a traffic offence. At present, the innocent person's only recourse is to appeal the conviction to County Court. The fact that the person who wants a conviction struck out must swear an affidavit will act as a deterrent to completely unfounded suggestions by unscrupulous persons.

#### Penalties

**12.**—(1) Where the penalty prescribed for an offence includes a fine of more than \$300 or imprisonment and proceedings are taken under this Part, the provision for fine or imprisonment does not apply and in lieu thereof the offence is punishable by a fine of not more than the maximum fine prescribed for the offence or \$300, whichever is the lesser.

(2) Where a person is convicted of an offence in a proceeding initiated by an offence notice,

~~a provision in or under any other Act that provides for an action or result following upon a conviction of an offence does not apply to the conviction, except,~~

(i) for the purpose of carrying out the sentence imposed,



- (ii) for the purpose of recording and proving the conviction,
  - (iii) for the purposes of the demerit point system under *The Highway Traffic Act*, and
  - (iv) for the purposes of section 27 of *The Highway Traffic Act*; and
- (b) any thing seized in connection with the offence after the service of the offence notice is not liable to forfeiture.

Because the offences for which Part I procedure is used are minor, regulatory matters, subsection (1) prescribes a maximum penalty of either \$300, or the maximum which is prescribed for the offence in the statute, whichever is the lesser. Therefore, if for some reason the prosecutor is seeking a fine greater than \$300, he will have to proceed by information under Part III of the Act.

Also, it should be noted that subsection (2)(a) states that if the proceeding is commenced by an offence notice, the provisions for any other results following on a conviction do not apply, unless they are for certain specified purposes, such as the demerit point system under The Highway Traffic Act. In addition, clause (b) states that any thing seized in connection with the offence after the service of the offence notice is not liable to forfeiture.

Therefore, if the prosecutor wishes to ask the court for an order restraining the defendant from future illegal behaviour, or if he wishes to confiscate certain illegal



goods which he discovers after serving the offence notice, he will have to use a summons under Part I or Part III, so that a court may hear all the circumstances surrounding the commission of the offence.

Regulations

13.—(1) The Lieutenant Governor in Council may make regulations,

- (a) prescribing the form of certificates of offence, offence notices and summonses and such other forms as are considered necessary under this Part;
- (b) authorizing the use in a form prescribed under clause *a* of any word or expression to designate an offence;
- (c) respecting any matter that is considered necessary to provide for the use of the forms under this Part.

(2) The use on a form prescribed under clause *a* of subsection 1 of any word or expression authorized by the regulations to designate an offence is sufficient for all purposes to describe the offence designated by such word or expression.

(3) Where the regulations do not authorize the use of a word or expression to describe an offence in a form prescribed under clause *a* of subsection 1, the offence may be described in accordance with section 26.

The certificate of offence, offence notice and summonses, as well as other forms used in Part I proceedings, will be in a prescribed form. Regulations are being prepared which will authorize the use of certain words or expressions to designate offences referred to in a form. Subsection (2) provides that the use of the authorized words or expressions is sufficient to describe the offence for all purposes.



Subsection (3) provides that where there are no authorized words, the offence may be described in accordance with section 26, which is discussed in detail in the chapter on Part III proceedings. The general effect of these sections is to prevent the quashing of a certificate of offence because of minor technical defects which do not prejudice the defendant in his defence.

The Repeal of The Summary Convictions Act

Section 147 of the Act provides that as of the date that The Provincial Offences Act is proclaimed, The Summary Convictions Act is repealed. Therefore, after that date, all offences which are charged must be dealt with in accordance with the new procedures. The Summary Convictions Act will continue to apply to all proceedings which were commenced before that date, as well as to parking infractions, since Part II will not come into force until a later date. By virtue of section 148, any reference in any Act, regulation, or by-law to The Summary Convictions Act will be deemed to be a reference to The Provincial Offences Act after it has been proclaimed.



### III. Arrest, Bail, and Search Warrants

#### Arrest

Generally speaking, The Provincial Offences Act has no effect upon the current powers of arrest available to police officers in matters connected with offences under provincial legislation. In other words, nothing in the Act affects any or all of the powers of arrest which are currently found in provincial statutes (e.g. sections 7, 9, 10, 14, 17, etc. of The Highway Traffic Act, and certain arrest provisions in various other statutes such as The Petty Trespass Act, The Game and Fish Act, and The Liquor Licence Act.)

The Act, on the other hand, does not expand upon a police officer's power to arrest in connection with provincial offences. In other words, there is no general power of arrest under The Provincial Offences Act just as there was no general power of arrest under The Summary Convictions Act. In addition, there is no power of arrest for municipal by-laws.

The effect of The Provincial Offences Act is that any powers of arrest with respect to individual offences must be found in the provisions of the Act creating those offences.



For example, a power of arrest for a breach of The Highway Traffic Act will have to be found (as it is now) in The Highway Traffic Act, and the same is true for all other provincial legislation.

The "arrest" provisions of The Provincial Offences Act are found in sections 127 through 132 inclusive; and, as is the case with much of the Act, they are derived substantially from various provisions of the Criminal Code.

127. In this Part, "officer in charge" means the police officer <sup>in charge</sup> who is in charge of the lock-up or other place to which a person is taken after his arrest.

Section 127 defines "officer in charge" and simplifies the definition in the Criminal Code. This simplified definition avoids questions with respect to whether or not the officer in charge has been properly designated as such by his commanding officer.

128.—(1) A warrant for the arrest of a person shall be executed by a police officer by arresting the person against whom the warrant is directed wherever he is found in Ontario.

(2) A police officer may arrest without warrant a person for whose arrest he has reasonable and probable grounds to believe that a warrant is in force in Ontario



Section 128(1) of the Act, which states that a warrant for the arrest of a person is properly executed by arresting that person wherever he is found in Ontario, sets out clearly the territorial jurisdiction of warrants issued for provincial offences. Such warrants are confined to the Province of Ontario and, unlike the Criminal Code, the Act contains no provision for arrest outside the jurisdiction in case of fresh pursuit.

Subsection (2) of section 128 is derived substantially from section 450(1)(c) of the Criminal Code. It simply states that a police officer is not required to produce the warrant at the time of arrest so long as he has reasonable and probable grounds to believe that a warrant has been issued and is in force in the province. The reasonable and probable grounds required are those previously required under the Code and are a matter of fact in each particular case. In other words, what constitutes "reasonable and probable grounds" under the Criminal Code will still constitute "reasonable and probable grounds" under The Provincial Offences Act for purposes of section 128(2).

129. Any person may arrest without warrant a person who he has reasonable and probable grounds to believe has committed an offence and is escaping from and freshly pursued by a police officer who has lawful authority to arrest that person and where the person who makes the arrest is not a police officer, shall forthwith deliver the person arrested to a police officer

Arrest  
without  
warrant



This latter point holds true of section 129 as well. Under that section, any person, including a police officer, can arrest a person without warrant where there are reasonable and probable grounds to believe that latter person has committed an offence and is in the process of escaping from and freshly pursued by a police officer. As with section 449(3) of the Code, where the person making an arrest is not a police officer, the arrested person must be delivered forthwith to a police officer.

130.—(1) Every police officer is, if he acts on reasonable <sup>use of force</sup> and probable grounds, justified in using as much force as is necessary to do what he is required or authorized by law to do.

<sup>use of force by citizen</sup> (2) Every person upon whom a police officer calls for assistance is justified in using as much force as he believes on reasonable and probable grounds is necessary to render such assistance.

Section 130 of the Act provides the same protection to a police officer acting on reasonable and probable grounds as does section 25(1) of the Criminal Code. A police officer is justified in using as much force as is necessary having regard to all of the circumstances. What force is necessary, for example, in effecting an arrest, will be determined by the fact situation in each case. Subsection (2) of that section provides the same protection to any person assisting a police officer in circumstances where that person has reasonable and probable grounds to believe that a certain amount of force is necessary to render the assistance.



Immunity  
from civil  
liability

131. Where a person is wrongfully arrested, whether with or without a warrant, no action for damages shall be brought.

- (a) against the police officer making the arrest if he believed in good faith and on reasonable and probable grounds that the person arrested was the person named in the warrant or was subject to arrest without warrant under the authority of an Act;
- (b) against any person called upon to assist the police officer if such person believed that the police officer had the right to effect the arrest; or
- (c) against any person required to detain the prisoner in custody if such person believes the arrest was lawfully made.

Section 131 of the Act provides immunity from civil actions to police officers or persons assisting police officers in situations where a person has been wrongfully arrested either with or without warrant.

A police officer will be granted this immunity, in cases of arrest with warrant, where he believed in good faith and on reasonable and probable grounds that the person arrested was the person named in the warrant.

In a case where the wrongful arrest was made without warrant, the immunity will be granted where the police officer believed in good faith and on reasonable and probable grounds that the person arrested was subject to that arrest without warrant under the authority of an Act of the Legislature. Section 131(c) grants this same immunity to a person required to detain a wrongfully arrested pris-



oner in custody where he believes that the arrest was lawfully made. This section will apply to any police officer into whose hands the wrongfully arrested person is delivered after the original arrest is made so long as the requisite belief in the lawfulness of the arrest is present.

Production of process      132.--(1) It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

Notice of reason for arrest      (2) It is the duty of every one who arrests a person, whether with or without warrant, to give notice to that person, where it is feasible to do so, of the reason for the arrest.

Subsections (1) and (2) of section 132 of the Act are precisely the same as subsections (1) and (2)(b) of section 29 of the Criminal Code.

In cases where a warrant of arrest exists, but it is not feasible for the police officer to have it with him, he will satisfy the provisions of subsection (2) where he informs the person being arrested that there is a warrant in effect for his arrest.

As to subsection (1), the question of whether or not it is feasible for a police officer to have the warrant with him is again a question of fact to be determined from the circumstances. It has been held that the provisions of this subsection are not satisfied in a case where a police officer arrested an accused without having the warrant in his possession, but where he could have had it as the arrest was made in the same building as the police office where the warrant was retained. It was held in this case that as the police officer failed in his duty, he was not engaged in effecting a lawful arrest.



There are other sections that deal with arrest powers and procedures in The Provincial Offences Act. The first is section 25 which deals with a justice who has received an information laid under Part III. Under that section, the justice has the option of confirming any summons in the prescribed form, cancelling any summons already issued, refusing to issue process, or issuing a warrant for the arrest of the defendant where the arrest is authorized by statute, where he (the justice) is satisfied on reasonable and probable grounds that it is necessary in the public interest to do so. Whether or not the public interest dictates the issue of a warrant will be a matter for the justice to decide on the facts of each case. Presumably, he may wish to consider any or all of the factors set out in section 133 of the Act which deals with bail proceedings and which is discussed below.

Section 41 is one other section which deals with arrest and it specifically concerns the arrest of a witness in situations where it is established that a witness will either not attend if a subpoena is served or has evaded service of the subpoena. In such a case, a police officer who arrests a person under such a warrant shall immediately take the person before a justice and the person shall be dealt with in accordance with the remaining provisions of section 41, discussed elsewhere in this manual. Finally, section 139 authorizes the court to issue a warrant for the arrest of a defendant in circumstances which are discussed more fully below.



## Bail

### Introduction

Once The Provincial Offences Act comes into force and The Summary Convictions Act has been repealed, no part of bail proceeding set out in the Criminal Code will have application to persons held in custody charged with provincial offences.

The basic difference between proceedings under The Provincial Offences Act and the appropriate sections of the Criminal Code is that under the former, the only consideration on a show cause or a bail hearing is to determine whether or not the prosecutor, having been given an opportunity to do so, has shown cause why the detention of the defendant is justified "to ensure his appearance in court".

Release  
after  
arrest:  
by  
officer:

133.—(1) Where a police officer acting under a warrant or other power of arrest, arrests a person, the police officer shall as soon as is practicable, release the person from custody after serving him with a summons or offence notice unless he has reasonable and probable grounds to believe that,

(a) it is necessary in the public interest for the person to be detained, having regard to all the circumstances including the need to,

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence, or



- (iii) prevent the continuation or repetition of the offence or the commission of another offence; or
- (b) the person arrested is ordinarily resident outside Ontario and will not respond to a summons or offence notice.

(2) Where a defendant is not released from custody under subsection 1, the police officer shall deliver him to the officer in charge who shall, where in his opinion the conditions set out in clauses *a* and *b* of subsection 1 do not or no longer exist, release the defendant,

(a) upon serving him with a summons or offence notice;

(b) upon his entering into a recognizance in the prescribed form without sureties conditioned for his appearance in court.

(3) Where the defendant is held for the reason only that he is not ordinarily resident in Ontario and it is believed that he will not respond to a summons or offence notice, the officer in charge may, in addition to anything required under subsection 2, require the defendant to deposit cash or other satisfactory negotiable security in an amount not to exceed.

(a) where the proceeding is commenced by certificate under Part I or II, the amount of the set fine for the offence or, if none, \$300; or

(b) where the proceeding is commenced by information under Part III \$500.

S. 133(1) and (2) are derived from, and simplify, the provisions of sections 450, 451 and 453 of the Code and s.17 of The Summary Convictions Act.

Subsection (1) commands the police officer to release the accused from custody unless the conditions in (a) or (b) are met.



The phrase "as soon as is practicable" has been interpreted as follows: "the stipulation... 'as soon as possible', or the like, means much the same - as soon as one reasonably can, having regard to all the circumstances." Armand v. Noonan (1918), 41 O.L.R. 551, 41 D.L.R. 433 (C.A.)

Subsection (1) states that the police officer may serve the defendant with a Part III summons or an offence notice, in addition to the summons under Part I, which will be used infrequently.

Subsection (1)(b) promotes the release by the arresting officer of a person resident outside of Ontario. The police officer may detain a non-resident only if he has reasonable and probable grounds to believe that the person in question will not respond to a summons or offence notice. This restriction on the officer's discretion to release an arrested person is not contained in the Criminal Code. It is in accordance with the distinction to be made between provincial offences and criminal offences.

Subsection (2) requires a police officer who does not release a defendant under subsection (1) to deliver that person to the officer in charge. If the officer in charge feels that the conditions necessitating the detention of the defendant no longer exist, he must release him, after serving him with a summons or offence notice and having him enter into a recognizance without sureties. The form of the recognizance will be prescribed by the regulations.



Under subsection (3) the officer in charge may require a defendant who is not ordinarily resident in Ontario to post cash bail, in addition to entering into a recognizance under Subsection (2). The phrase "or other satisfactory negotiable security" makes the release of non-residents easier by permitting the deposit of some security other than cash. A satisfactory negotiable security includes a certified cheque or Canada savings bond.

"Proceeding" is used instead of the word "offence" to reflect the presumption of innocence. The officer in charge has no power to require the defendant to enter into a recognizance with sureties to any amount. This can be done only by order of a justice under section 134.

134.—(1) Where a defendant is not released from custody <sup>Person is</sup> ~~before~~ <sup>custody is</sup> brought before a justice under section 133, the officer in charge shall, as soon as is practicable but in any event within twenty-four hours, bring him before a justice and the justice shall, unless a plea of guilty is taken, order that the defendant be released upon giving his undertaking to appear unless the prosecutor having been given an opportunity to do so shows cause why the detention of the defendant is justified to ensure his appearance in court or why an order under subsection 2 is justified for the same purpose.

(2) Subject to subsection 1, the justice may order the <sup>Order for conditional release,</sup> release of the defendant.

(a) upon his entering into a recognizance to appear with such conditions as are appropriate to ensure his appearance in court.



b. where the offence is one punishable by imprisonment for twelve months or more, conditional upon his entering into a recognizance before a justice with sureties in such amount and with such conditions, if any, as are appropriate to ensure his appearance in court or, with the consent of the prosecutor, upon his depositing with the justice such sum of money or other valuable security as the order directs in an amount not exceeding,

(i) where the proceeding is commenced by certificate under Part I or II, the amount of the set fine for the offence or, if none, \$300, or

(ii) where the proceeding is commenced by information under Part III, \$1,000; or

(c) if the defendant is not ordinarily resident in Ontario, upon his entering into a recognizance before a justice, with or without sureties, in such amount and with such conditions, if any, as are appropriate to ensure his appearance in court, and depositing with the justice such sum of money or other valuable security as the order directs in an amount not exceeding,

(i) where the proceeding is commenced by certificate under Part I or II, the amount of the set fine for the offence or if none, \$300, or

(ii) where the proceeding is commenced by information under Part III, \$1,000

**Idea** (3) The justice shall not make an order under clause b or c of subsection 2 unless the prosecutor shows cause why an order under the immediately preceding clause should not be made

**Order for detention** (4) Where the prosecutor shows cause why the detention of the defendant in custody is justified to ensure his appearance in court, the justice shall order the defendant to be detained in custody until he is dealt with according to law

**Reasons** (5) The justice shall include in the record a statement of his reasons for his decision under subsection 1, 2 or 4

**Evidence at hearing** (6) In a proceeding under subsection 1, the justice may receive and base his decision upon information he considers credible or trustworthy in the circumstances of each case except that the defendant shall not be examined or cross-examined in respect of the offence with which he is charged.

(7) A proceeding under subsection 1 shall not be adjourned for more than three days without the consent of the defendant Adjournments



S. 134 is derived from s. 457 of the Code, with modifications to reflect the difference in character of the offences which are created by provincial laws.

Under subsection (1) the officer in charge is commanded to bring the defendant in front of a justice within twenty-four hours of arrest. The justice shall release the defendant unless the prosecutor can show cause why a detention is justified to ensure his appearance in court. Alternatively, the prosecutor may show cause why the defendant should be released but only on conditions pursuant to s. 134(2). Under subsection (1), the evidentiary burden upon the prosecutor at this early stage is of the lowest standard, namely, the balance of probability. R. v. Julian (1972), 20 C.R.N.S. 227 (N.S.S.C.)

Under s. 134 (2), the ability to impose a requirement for sureties or cash bond is strictly limited to cases either of an offence punishable by imprisonment for 12 months or more, or to a situation where the defendant is not ordinarily a resident of Ontario. The amounts are limited under parts (b) and (c) of subsection (2), depending upon whether the proceeding has been commenced by certificate or information under Part III.

Under subsection (5), the justice must record a statement of his reasons in the case of any decision for either custody or release on conditions.



Under subsection (6), informal evidence may be received by the justice, if he considers it "credible or trustworthy in the circumstances of the case". The Ontario High Court has declared that: Credible and trustworthy evidence includes evidence ordinarily inadmissible at trial as long as the other party has fair opportunity to correct or contradict it. Re Powers and The Queen (1972), 9 C.C.C. (2d) 588; 20 C.R.N.S. 23

If the defendant contradicts, the prosecutor must either abandon his position or adduce real evidence so that the justice may weigh the "evidence".

135.—(1) Where a defendant is not released from custody under section 133 or 134, he shall be brought before the court forthwith and, in any event, within eight days.

(2) The justice presiding upon any appearance of the defendant in court may, upon the application of the defendant or prosecutor, review any order made under section 134 and make such further or other order under section 134 as to him seems appropriate in the circumstances.

Subsection (1) stresses the view that the gravity of provincial offences is not consistent with pre-trial detention of any substantial length. Once a person is detained, the Crown must bring him to court within 8 days. The trial, however, does not have to be commenced or concluded within 8 days.

Subsection (2) is derived from section 457.8(2), altering it in favour of a broader power to modify. At any time when a defendant who is in custody appears before a Provincial Offences Court, the justice presiding may review any order made under s. 134 for custody, conditions and/or surety.



136. A defendant or the prosecutor may appeal from an <sup>Appeal</sup> order or refusal to make an order under section 134 or 135 and the appeal shall be to the county or district court of the county or district in which the adjudication was made and shall be conducted in accordance with the rules made under section 123.

Section 136 replaces the bail review proceedings of the Criminal Code with an appeal. In all cases, there is a right of appeal by either the prosecutor or the defendant to the County Court, and an order for forfeiture under a recognizance may only be made in the County Court.

137.—(1) A person who is released upon deposit under subsection 3 of section 133 or clause c of subsection 2 of section 134 may appoint the clerk of the court to act as his agent, in the event that he does not appear to answer to the charge, for the purpose of entering a plea of guilty on his behalf and authorizing the clerk to apply the amount so deposited toward payment of the fine and costs imposed by the court upon the conviction, and the clerk shall act as agent under this subsection without fee.

(2) An officer in charge or justice who takes a recognizance, <sup>Returns to court</sup> money or security under section 133 or 134 shall make a return thereof to the court where the defendant is required to appear.

(3) The clerk of the court shall, upon the conclusion of <sup>Returns to</sup> proceedings, make a financial return to every person who <sup>sureties</sup> deposited money or security under a recognizance and return the surplus, if any.

This section is derived from section 18 of The Summary Convictions Act. It is intended to make the laws of Ontario apply effectively to non-residents without unduly inconveniencing them, by permitting the clerk of the court to act as agent for the purpose of entering a plea of guilty.



### Recognizances

138.—(1) The recognizance of a person to appear in a proceeding binds the person and his sureties in respect of all appearances required in the proceeding at times and places to which the proceeding is adjourned.

Recognition binds independently of other charges (2) A recognizance is binding in respect of appearances for the offence to which it relates and is not vacated upon the arrest, discharge or conviction of the defendant upon another charge.

Liability of principal (3) The principal to a recognizance is bound for the amount of the recognizance due upon forfeiture.

Liability where sureties (4) The principal and each surety to a recognizance are bound, jointly and severally, for the amount of the recognizance due upon forfeiture for non-appearance.

This section is derived from sections 697 and 698 of the Criminal Code. Sureties are bound only with respect to appearances of the defendant in court, not to all conditions of the recognizance.

Application by surety to be relieved (1) A surety to a recognizance may, by application in writing to the court at which the defendant is required to appear, apply to be relieved of his obligation under the recognizance and the court shall thereupon issue a warrant for the arrest of the defendant.

Certificate of arrest (2) When a police officer arrests the defendant under a warrant issued under subsection 1, he shall bring the defendant before a justice under section 134 and certify the arrest by certificate in the prescribed form and deliver the certificate to the court.

Vacating of recognizance (3) The receipt of the certificate by the court under subsection 2 vacates the recognizance and discharges the sureties.

This section is derived from section 700 of the Code.

The phrase "shall bring the defendant before a justice under s.134" requires the police officer to bring the defendant before a justice of the peace in order to be dealt with by the court. The officer will certify the arrest by filling in the prescribed form and delivering it to the court.



Delivery of  
defendant  
by surety

140. A surety to a recognizance may discharge his obligation under the recognizance by delivering the defendant into the custody of the court at which he is required to appear at any time while it is sitting at or before the trial of the defendant.

This section is derived from s. 701 of the Code.

Certificate  
of  
default

141.—(1) Where a person who is bound by recognizance does not comply with a condition of the recognizance, a justice having knowledge of the facts shall endorse on the recognizance a certificate in the prescribed form setting out,

- (a) the nature of the default;
- (b) the reason for the default, if it is known;
- (c) whether the ends of justice have been defeated or delayed by reason of the default; and
- (d) the names and addresses of the principal and sureties.

Certificate  
as evidence

(2) A certificate that has been endorsed on a recognizance under subsection 1 is evidence of the default to which it relates.

(3) The clerk of the court shall transmit the endorsed <sup>Application</sup> <sub>for</sub> recognizance to the clerk of the county or district court of the same county or district and, upon its receipt, the endorsed recognizance constitutes an application for the forfeiture of the recognizance.

(4) A judge of the county or district court shall fix a time <sup>Notice of</sup> <sub>hearing</sub> and place for the hearing of the application by the county or district court and the clerk of the county or district court shall, not less than ten days before the time fixed for the hearing, deliver notice to the prosecutor and to each principal and, where the application is for forfeiture for non-appearance, each surety named in the recognizance, of the time and place fixed for the hearing and requiring each principal and surety to show cause why the recognizance should not be forfeited.

(5) The county or district court may, after giving the <sup>Order as to</sup> <sub>forfeiture</sub> parties an opportunity to be heard, in its discretion grant or refuse the application and make any order in respect of the forfeiture of the recognizance that the court considers proper.

This section is derived from sections 704 and 705 of the Code. Subsection (6), dealing with collection, has been omitted.



## Search Warrants

The poorest man in his cottage bid defiance  
to all the forces of the Crown. It may be  
frail - its roof may shake - the winds may  
blow through it - the storm may enter -  
but the King of England cannot enter, all  
his forces dare not cross the threshold of  
the ruined tenement.

William Pitt  
First Earl of Chatham

## Introduction

The principle of the sanctity of a person's dwelling was firmly established in the English law as early as 1604, when it was stated "the house of everyone is to him as his castle and fortress." This principle is also firmly established in Canadian law. Thus, unless there is express authority to justify the search, a police officer or any other person has no right to enter the premises of a citizen without the owner's clear consent.

The ancient and general principle governing the use of the search warrant process was reaffirmed by the British Columbia Supreme Court in the following terms: Re Black and R. (1973), 13 C.C.C.(2d) 446, at 448 (per Berger, J.):

It should never be forgotten that a search warrant is an extraordinary remedy. It authorizes the invasion of a citizen's home, or his business, it countenances the infringement of his privacy. If such a remedy is sought by the Crown from a judicial officer (and a Justice of the Peace acting under s. 443 of the Criminal Code is a judicial officer), the requirements of the law must be observed. It is fundamental that any search warrant must on its face show by whose authority it has been issued.

The general power to issue a search warrant, to detain the seized thing, and to examine and seize documents where privilege is claimed, is found in sections 142 to 144 of The Provincial Offences Act; its predecessor sections are section 16 of The Summary Convictions Act and sections



443 to 446 of the Criminal Code.

Issue of a Search Warrant

142.--(1) Where a justice is satisfied by information <sup>Search warrant</sup> upon oath that there is reasonable ground to believe that there is in any building, receptacle or place,

- (a) anything upon or in respect of which an offence has been or is suspected to have been committed; or
- (b) anything that there is reasonable ground to believe will afford evidence as to the commission of an offence.

he may at any time issue a warrant in the prescribed form under his hand authorizing a police officer or person named therein to search such building, receptacle or place for any such thing, and to seize and carry it before the justice issuing the warrant or another justice in the county or district in which the provincial offences court having jurisdiction in respect of the offence is situated to be dealt with by him according to law.

Expiration (2) Every search warrant shall name a date upon which it expires, which date shall be not later than fifteen days after its issue.

When to be executed (3) Every search warrant shall be executed between 6 a.m. and 9 p.m. standard time, unless the justice by the warrant otherwise authorizes.

Section 142(1) permits a justice to issue a search warrant. It must be emphasized that a search warrant authorizes acts which otherwise would be strictly illegal; thus the justice must make sure that the facts alleged in the information are sufficient to justify him in exercising his discretion to issue the requested search warrant.,,

"Where a justice is satisfied..." The applicant for the warrant must satisfy the justice that there are reasonable grounds to believe that the article in question will afford



evidence relevant to the issue and with respect to the alleged offence. The matters which the police must demonstrate to the justice have been stated as follows: Re Worrall, [1965] 2 C.C.C. 1 (Ont. C.A.).

In issuing a search warrant, it is the duty of the Justice of the Peace to decide whether the articles in question should be seized or not. He must determine whether there are reasonable grounds to believe that the articles in question will afford evidence with respect to the offence alleged. This means that the justice must consider whether the production of the articles will afford evidence which would be relevant to the issue, and would be properly tendered as evidence in a prosecution in which the alleged fraud is in issue.

"By information upon oath" is a common phrasing providing that there be judicial approval of a sworn statement by an informant before the issue of the warrant. The fact that the statement is sworn does not invest it with automatic judicial approval, however.

"Issue a warrant in the prescribed form."

The form for the warrant is prescribed by the rules of the Provincial Offences Court.

"Authorizing a police officer or person named there." This permits the justice to empower a person other than a police officer to enter on private premises. This provision follows the Code, section 443. Frequently, the police or the Crown desire that the search be conducted with the assistance of an expert, for example, a chartered



accountant. This wording authorizes such a person, where specifically named in the warrant, to be protected from being a trespasser. A Provincial Offences Officer who is not a police officer can also be authorized to search. A problem which occasionally arises is whether "...police officer or person named..." is to be read disjunctively. The spirit of the section does not support such a reading. The presence of expert assistance to the police provides for a more expeditious search. In this regard see generally Re Worrall, [1965] 2 C.C.C. 1 (Ont. C.A.) at 13 (Roach, J.A., dissenting) and Re Purdy (1972), 8 C.C.C. (2d) 52 (N.B.C.A.) per Limerick, J.A. at 60. In both these cases the civilian involved who accompanied the police on Code searches was not specifically named in the warrant and was therefore a trespasser.



Information for Search Warrant

- (a) The information must be upon oath.
- (b) It must disclose the grounds of the informant's belief.
- (c) It must describe the offence with sufficient particularity to identify the transaction referred to.
- (d) It must state that an offence has been committed or if the offence is suspected to have been committed the grounds for suspicion should be stated.
- (e) It must describe sufficiently the objects to be seized.

A Magistrate, in issuing a search warrant must act judicially. The offence must be described in the information with sufficient particularity to identify the transaction referred to so as to enable the Magistrate to judicially exercise the discretion conferred upon him.

Section 510 governs in considering the sufficiency of an information for a search warrant.

R. v. READ, EX PARTE BIRD CONSTRUCTION CO. LTD.  
[1966] 54 W.W.R. 93, 2 C.C.C. 137 (Alta.)

An information for a search warrant which is based solely on information given the informant by an agent of the Attorney General but does not state the nature and extent of such agent's investigations nor disclose his name, is not sufficient material upon which to issue a warrant, and a warrant so issued will be quashed.

IMPERIAL TOBACCO SALES CO. v. A.G. ALTA et al.,  
[1971] 1 W.W.R. 401, 76 C.C.C. 84 (Alta. C.A.)

The search warrant was quashed because the information was vague. The description of the effects which were the object of the search were vague and generalized. The information did not mention either for whom, against whom, or on what or in relation to what the alleged crimes of theft, fraud and false pretences could have been committed.

REGENCY REALTIES INC. v. LORANGER (1962), 36 C.R.  
- 291 (Que.)



In the information, the informant must not merely state that he believes and suspects, but he must set out the grounds of his belief, upon which the magistrate exercises a judicial discretion.

REX v. MOORE, [1922] 1 W.W.R. 629; 37 C.C.C. 72 (Alta. C.A.)

A search warrant will be quashed if the information fails to allege facts and circumstances showing the causes of suspicion, or if it fails to allege any criminal offence.

REX v. FRAIN (1915), 24 C.C.C. 389; 32 W.L.R. 387 (Sask.).

The information must set out the "causes of suspicion."

THE KING v. KEHR (1906), 11 C.C.C. 52 (Ont.)

A statement that the information is laid on the instructions of the Crown counsel is obviously not a disclosure of grounds of belief, and is insufficient to give the justice jurisdiction to issue a search warrant.

POLIQUIN v. DECARIE (1927), 29 Que. P.R. 407; 33 R. de Jur. 367.

#### The Search Warrant Itself

The ingredients of a search warrant are:

- (a) There should be some documentary authorization to search; there are no oral search warrants.
- (b) There must be some statute law covering the search warrant.
- (c) It must be issued by a designated court official - Justice of the Peace, Magistrate or Judge as set out in the statute:- That official must indicate the nature of his office under his signature on the warrant. See Re Black and R. (1973), 13 C.C.C. (2d) 446.



- (d) Justice of the Peace must satisfy himself of the reasonable grounds.
- (e) The search warrant must allege an offence.
- (f) It must accurately describe the premises to be searched and should authorize an entry.
- (g) It must not be vague or use broad phrases.
- (h) The objects sought must be relevant to the charge and accurately described.
- (i) Under s. 142(2) the search warrant has a fifteen-day limit. The Justice should write in the limit, which may be less than fifteen days.

These essentials exist in all manner of search warrants whether issued pursuant to federal or provincial statutes.

A search warrant was quashed on the basis that there were insufficient grounds for it. The Court reviewed the judicial decision of the Justice of the Peace. Relying on the SHUMIATCHER case (1960), 129 C.C.C. 267, the court also held that the warrant was objectionable because it used very broad phrases, authorizing a search in a law office for "other material of every nature relating to the operation." The broad phrases must be applied ejusdem generis and not at large.

REGINA v. COLVIN, EX PARTE MERRICK et al.  
[1970] 3 O.R. 612; (1970), 1 C.C.C. (2d) 8

Search warrants were quashed because the Magistrate failed to act judicially in granting the warrants, and also because the description of the documents contained in the warrants was insufficient to enable those executing them to know what documents to seize. Those making the search, which took place in a law office, were examining files that had no relation to the charges set out in the warrants.

SHUMIATCHER v. A.G. of SASK. & SALTERIO, J.P.  
(1960), 129 C.C.C. 267; 34 C.R. 152(Sask.)



A search warrant was quashed on the ground that it did not contain sufficient description of the thing to be searched for and seized and carried before the Justice issuing the warrant.

IMPERIAL TOBACCO SALES CO. v. A.G. ALTA et al  
(1941), 76 C.C.C. 267; 34 C.R. 152 (Sask.)

A search warrant was quashed because it did not set forth the offence in respect to which the search was made. The offence was not stated nor referred to in any respect. The court also added that a more accurate or specific description of the things to be searched for should have been set forth in the warrants.

REX v. SOLLOWAY MILLS & CO., [1930] 3 D.L.R. 293;  
53 C.C.C. 261 (Alta. C.A.)

A search warrant is invalid if it does not describe the things to be searched for, and the offence in respect of which the search is made.

REX v. LA VESQUE (1918), 30 C.C.C. 190; 42  
D.L.R. 120 (N.E.C.A.)

A search warrant is invalid if it does not allege a criminal offence.

REX v. FRAIN (1915), 24 C.C.C. 389; 32 W.L.R. 387

The premises to be searched must be described in the warrant, not by metes and bounds, but by a direction to search the dwelling house of a named person in a certain township.

SLEETH v. HURLBERT (1896), 25 S.C.R. 620; 3  
C.C.C. 197

..

A search warrant was held to be valid in that it was sufficiently definite as to the place to be searched and the persons directed to make it. A search of the refreshment booth was valid under a warrant directing a search of the premises of an exhibition association.

REGINA v. MCGARRY (1893), 24 O.R. 52 (C.A.)



A search warrant will be quashed if the description of the offence is not sufficiently clear to enable the person whose premises are being searched to know the exact object of the search, and if it does not adequately describe the documents, and leaves to the discretion of the police what documents should be seized.

RE UNITED DISTILLERS LTD. (1946), 88 C.C.C.  
338; 1947 3 D.L.R. 900 (B.C.)

A search warrant was quashed because it contained no allegation that an offence had been committed other than to describe it as a violation of sections 269, 323, 309, and 311 of the Code without further details.

REGENCY REALTIES INC. v. LORANGER (1962),  
36 C.R. 291 (Que.)

The doctrine of severability was applied to the search warrant issued in this case. The part of the warrant dealing with obscene books was held valid, while the second part of the warrant dealing with company records and invoices was held invalid, because it did not sufficiently describe the things to be searched for, and left the peace officers a wide open discretion as to what books and invoices they were to seize and without regard to whether they related in any way to the offence.

RE REGINA AND JOHNSON & FRANKLIN WHOLESALE DISTRIBUTORS LTD. (1971), 3 C.C.C. (2d) 484 (B.C.C.A.)

See also Re P.S.I. Mind Development Institute Ltd. et al. and The Queen (1977), 37 C.C.C. (2d) 263 (Ont. H.C.)

A search warrant ought not to be used to enable those executing it to go on a "fishing expedition" and to allow them freedom to seize everything which they thought "was good for the case." Objects seized must be relevant to the charge.



REGINA v. FAUTEUX, EX PARTE MORGENTALER  
(1971), 3 C.C.C. (2d) 187 (Que.)

Execution of Search Warrant

Where a constable has searched premises, it will be presumed that he acted under a proper warrant, in the absence of evidence to the contrary.

REX v. MARTIN, [1930] 52 C.C.C. 367 (Sask.)

On the execution of a search warrant, the first requirement is that the police officer have the warrant in his possession at the time of the search. When the place to be searched is a dwelling house, there must be a demand to open. Only after that request is made is he entitled to break open the doors. Where the place to be searched is not a dwelling house, then the officer need not first demand an entrance or signify the cause of his coming, but he must have the search warrant with him, in order to exhibit it for inspection.

WAH KIE v. CUDDY (1914), 7 W.W.R. 797;  
23 C.C.C. 383 (Alta.)

Section 142(2) provides for a 15-day life span to an issued warrant. This limit is the maximum, and is not automatic.

Section 142(3) is worded differently from the former section 16(2) of The Summary Conviction Act. The reference to sunrise and sunset has been changed to provide more certainty and precision by referring to specific times.

Section 143

143.—(1) Where any thing is seized and brought before a justice, he shall by order,

- (a) detain it or direct it to be detained in the care of a person named in the order; or



(b) direct it to be returned.

and the justice may in the order authorize the examination, testing, inspection or reproduction of the thing seized upon such conditions as are reasonably necessary and directed in the order, and may make any other provision as in the opinion of the justice is necessary for its preservation

(2) Nothing shall be detained under an order made under subsection 1 for a period of more than three months after the time of seizure unless, before the expiration of that period,

(a) upon application a justice is satisfied that having regard to the nature of the investigation, its further detention for a specified period is warranted and he so orders, or

(b) proceedings are instituted in which the thing detained may be required

(3) Upon the application of the defendant, prosecutor or person having an interest in a thing detained under subsection 1, a justice may make an order for the examination testing inspection or reproduction of any thing detained upon such conditions as are reasonably necessary and directed in the order

(4) Upon the application of a person having an interest in a thing detained under subsection 1, and upon notice to the

defendant, the person from whom the thing was seized, the person to whom the search warrant was issued and any other person who has an apparent interest in the thing detained, a justice may make an order for the release of any thing detained to the person from whom the thing was seized where it appears that the thing detained is no longer necessary for the purpose of an investigation or proceeding.

(5) Where an order or refusal to make an order under subsection 3 or 4 is made by a justice of the peace, an appeal lies therefrom in the same manner as an appeal from a conviction in a proceeding commenced by means of a certificate



Subsections 1 and 2 are derived from section 446 of the Code. However, The Provincial Offences Act gives the justice a broader power to direct the return of things brought before him immediately after their seizure. This is contrary to the case law view of Code section 446(1), which interprets the justice's function regarding return as an administrative act. Refer to Re Atkinson and The Queen (1978), 41 C.C.C. (3d) 435 (N.B.C.A.) at 439.

Section 143(2) permits the authorities to apply for an extension of the detention period prior to the expiry of the three-month period following the seizure where a charge has not been laid but an investigation continues. The applicant must satisfy the justice that, having regard to the nature of the investigation, a further detention is warranted. The justice is again acting judicially; it is therefore submitted that in exercising the discretion, evidence of the necessity for the extension of time should be placed before him by the Provincial Offences Officer. Since s. 76 prescribes a six-month limitation period on the initiation of proceedings, unless differently prescribed in a separate statute, the need for more than one extension should be negligible.

Section 143(3) gives the defendant, the prosecutor, and persons having an interest in those things the right to apply, in the interest of disclosure, to inspect, copy or have his own examinations and tests performed on an item which has been seized.

Section 143(4) allows any person having an interest in things which have been detained to secure the release of anything no longer required in an investigation. An example of an interested party is a neighbour who loaned an item to a defendant.



Section 143(5) provides a relatively quick and inexpensive appeal from orders and refusals to make orders under subsections 3 and 4.

144.—(1) Where under a search warrant a person is about to examine or seize a document that is in the possession of a lawyer and a solicitor-client privilege is claimed on behalf of a named client in respect of the document, the person shall, without examining or making copies of the document,

- (a) seize the document and place it, together with any other document seized in respect of which the same claim is made on behalf of the same client, in a package and seal and identify the package; and
- (b) place the package in the custody of the clerk of the court in the jurisdiction of which the seizure was made or, with the consent of the person and the client, in the custody of another person

(2) No person shall examine or seize a document that is in the possession of a lawyer without giving him a reasonable opportunity to claim the privilege under subsection 1.

(3) A judge may, upon the *ex parte* application of the lawyer, by order authorize the lawyer to examine or make a copy of the document in the presence of its custodian or the judge, and the order shall contain such provisions as are necessary to ensure that the document is repackaged and resealed without alteration or damage.

(4) Where a document has been seized and placed in custody under subsection 1, the client by or on whose behalf the claim of solicitor-client privilege is made may apply to a judge for an order sustaining the privilege and for the return of the document.

(5) An application under subsection 4 shall be by notice of motion returnable not later than thirty days after the date on which the document was placed in custody.



(6) The person who seized the document and the Attorney General are parties to an application under subsection 4 and are entitled to at least three days notice thereof.

(7) An application under subsection 4 shall be heard in private, and, for the purposes of the hearing, the judge may examine the document and, if he does so, shall cause it to be resealed.

(8) The judge may, by order,

(a) declare that the solicitor-client privilege exists or does not exist in respect of the document;

(b) direct that the document be delivered up to the appropriate person.

(9) Where it appears to a judge upon the application of the Attorney General or person who seized the document that no application has been made under subsection 4 within the time limit prescribed by subsection 5, the judge shall order that the document be delivered to the applicant.

Section 144(1) applies when solicitor-client privilege is claimed; it is derived from section 232 (3) of The Income Tax Act. "Solicitor-client privilege" is defined at s. 232(1) (e) of The Income Tax Act as:

The right, if any, that a person has in a superior court in the province when the matter arises to refuse an oral or documentary communication on the ground that the communication is one passing between him and his lawyer in professional confidence, except that for the purposes of the section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.

This definition has been subject to much judicial interpretation. For example, in Re. B. X. Development Inc. and Nine Others and The Queen (1977), 31 C.C.C. (2d) 14 (B.C.C.A.), Bull, J.A., held that solicitor-client privilege does not arise from the mere fact that the documents in question were or are



to be seized from a lawyer's office. See also R. v. Wurm, (March 16, 1979) as yet unreported (Alta. S.C.). In R. v. Colvin, ex parte Merrick (1970), 1 C.C.C. (2d) 8 (Ont. H.C.), Osler, J., held that the privilege does not extend to correspondence or documents prepared for the purpose of assisting a client to commit a crime, nor to material stored with the solicitor purely for the purpose of avoiding seizure.

Subsection (4) allows for an application for an order sustaining the privilege and for the return of the document.

Subsection (5) and (6) are also derived from s. 232 of The Income Tax Act and provide procedural precision in relation to notices and time limits.

Subsections (7) and (8) set up a pre-trial hearing in front of a judge to determine the privilege issue. Subsection (7) provides for an in camera hearing. At this hearing, the judge will have the opportunity to see the documents. The defence counsel will have seen the documents beforehand by virtue of subsection (3). Subsection (8) gives the judge discretion to declare that the privilege either exists or does not exist. If he finds the latter, he may direct that the document be returned.

Under common law, it is unclear whether the solicitor-client privilege is a rule of evidence or a rule of property. If it were only a rule of evidence as held in R. v. Colvin, supra, then the police could seize such documents; however, the papers could not be introduced as evidence in a trial. Subsections (7) and (8) give the solicitor-client privilege stated in subsection (1) some authority as a rule of property.

Subsection (9) directs the judge to release the document where no application has been made within the time limit set out in subsection (4).



Territorial Jurisdiction

The Provincial Offences Act contains no provisions similar to Code section 443(2). This section in the Code provides for a "backing" procedure where the warrant is to be executed in a territorial division other than that of issue. The absence of such a provision assumes that all justices of the peace and provincial court judges have jurisdiction in and for the entire province of Ontario. A justice with limited geographical jurisdiction, however, cannot issue a search warrant for execution outside of his own "bailliwick."



IV. Commencement of Proceedings under Part III of the Act and Powers of Amendment

Introduction

In addition to the simplified procedure under Part I, The Provincial Offences Act provides for the commencement of proceedings by the traditional method of laying an information. If Part III is used, the person who is charged with an offence will be given a summons, which commands him to appear in the Provincial Offences Court. There is no out-of-court settlement or walk-in plea of guilty under Part III. In addition, the prosecutor may ask the court to impose the full range of penalties which are permitted by law, and is not restricted to the maximum fine of \$300 under Part I.

Part III proceedings will usually be used for offences which are of a more serious nature and for which penalties are greater, as well as perhaps in situations where it is essential to have the defendant appear in court. Some typical cases would be where a serious injury or fatality has resulted from an act of careless driving, or where the defendant's record and previous behaviour is so bad that the court may wish to consider the imposition of serious penalties, or possibly probation.



Commencement of Proceeding by Information.

22.—(1) In addition to the procedure set out in Parts I and II for commencing a proceeding by the filing of a certificate, a proceeding in respect of an offence may be commenced by laying an information.

(2) Where a summons or offence notice has been served under Part I, no proceeding shall be commenced under subsection 1 in respect of the same offence except with the consent of the Attorney-General or his agent.

Subsection (1) provides for the commencement of the more formal procedure. For the purposes of any limitation period, the proceeding is commenced when the officer lays the information. Refer to section 76 of the Act concerning limitation periods.

Subsection (2) permits the prosecutor to proceed under Part III even if a defendant has already been given an offence notice or summons under Part I of the Act. However, since the defendant will be subjected to the possible imposition of higher penalties, after he has been given an offence notice setting forth only the set fine, it is necessary to obtain the consent of the Attorney General or his agent, a Crown Attorney, before proceeding under Part III. The prosecutor would probably wish to do this only in very unusual circumstances. An example might be where, after an offence notice is served, information comes to light that the defendant has committed the same offence several times before and has never paid his fines. It



would then be appropriate to seek consent to proceed under Part III, so that a suitable sentence could be sought from the court.

23. Where a provincial offences officer believes, on reasonable and probable grounds, that an offence has been committed by a person whom he finds at or near the place where the offence was committed, he may, before laying an information, serve the person with a summons in the prescribed form.

As noted in chapter II, an officer may initiate Part III proceedings by issuing a summons on the spot, which will be confirmed by a justice (or perhaps cancelled) when the officer subsequently lays the information. See page 10.

Laying the Information

24.—(1) Any person who, on reasonable and probable grounds, believes that one or more persons have committed an offence, may lay an information in the prescribed form and under oath before a justice alleging the offence and the justice shall receive the information

(2) An information may be laid anywhere in Ontario. " "



Subsection (1) is derived from section 455 of the Criminal Code. It allows any person, whether a provincial offences officer or a private individual, to lay an information. Subsection (2) permits the informant to swear the information at a place which is convenient to him, although the proceeding will be made returnable in a court which has jurisdiction over the offence. For a discussion of the selection of the proper court, refer to section 30.

**25.—(1)** A justice who receives an information laid under section 24 shall consider the information and, where he considers it desirable to do so, hear and consider *ex parte* the allegations of the informant and the evidence of witnesses and,

(a) where he considers that a case for so doing is made out,

(i) confirm the summons served under section 23, if any,

(ii) issue a summons in the prescribed form, or

(iii) where the arrest is authorized by statute and where the allegations of the informant or the evidence satisfy the justice on reasonable and probable grounds that it is necessary in the public interest to do so, issue a warrant for the arrest of the defendant; or

(b) where he considers that a case for issuing process is not made out,

(i) so endorse the information, and

(ii) where a summons was served under section 23, cancel it and cause the defendant to be so notified.

(2) A justice shall not sign a summons or warrant in blank



Section 25 is derived from section 455.3 of the Criminal Code. Under The Provincial Offences Act, however, the justice may act upon the sworn information alone. He is not required to hear the allegations of the informant or the evidence of witnesses. Under subsection (1)(a), where he considers that a case has been made out, the justice may confirm a summons issued under section 23, or at that time issue a summons to the defendant, or else issue a warrant for his arrest.

It is important to note that the arrest must be authorized by a statute, such as under certain sections of The Highway Traffic Act. Also, the informant must satisfy the justice that "it is necessary in the public interest" to issue the warrant to arrest. There is no general power of arrest for provincial offences.

If the justice considers that a case for issuing process has not been made out, he will so endorse the information, and, if a summons was served under section 23, cancel it and cause the defendant to be notified.

#### The Counts in an Information

26.—(1) Each offence charged in an information shall be set out in a separate count.

(2) Each count in an information shall in general apply to a single transaction and shall contain and is sufficient if it contains in substance a statement that the defendant committed an offence therein specified.



(3) Where in a count an offence is identified but the count fails to set out one or more of the essential elements of the offence, a reference to the provision creating or defining the offence shall be deemed to incorporate all the essential elements of the offence.

(4) The statement referred to in subsection 2 may be,

- (a) in popular language without technical averments or allegations of matters that are not essential to be proved;
- (b) in the words of the enactment that describes the offence; or
- (c) in words that are sufficient to give to the defendant notice of the offence with which he is charged

(5) Any number of counts for any number of offences may be joined in the same information.

(6) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the defendant reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to.

(7) No count in an information is insufficient by reason of the absence of details where, in the opinion of the court, the count otherwise fulfils the requirements of this section and, without restricting the generality of the foregoing no count in an information is insufficient by reason only that,

- (a) it does not name the person affected by the offence or intended or attempted to be affected;
- (b) it does not name the person who owns or has a special property or interest in property mentioned in the count;
- (c) it charges an intent in relation to another person without naming or describing the other person;
- (d) it does not set out any writing that is the subject of the charge;
- (e) it does not set out the words used where words that are alleged to have been used are the subject of the charge;



- (f) it does not specify the means by which the alleged offence was committed;
  - (g) it does not name or describe with precision any person, place or thing; or
  - (h) it does not, where the consent of a person, official or authority is required before proceedings may be instituted for an offence, state that the consent has been obtained.
- (8) A count is not objectionable for the reason only that,
- (a) it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an offence the matters, acts or omissions charged in the count; or
  - (b) it is double or multifarious.
- (9) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negatived, as the case may be, in an information.

The offence which is alleged in the information must be described in accordance with this section. Section 26 is based upon provisions in the Criminal Code, but also gives statutory effect to the recent decision of the Supreme Court of Canada in the case of R. v. Côté. The court stated that the test for the sufficiency of an information is

whether the accused was reasonably informed of the transaction alleged against him, thus giving him the opportunity of making a full defence and ensuring a full trial. Where ...the information recites all the facts and relates them to



a definite offence identified by the relevant section, it is impossible for the accused to be misled. (R. v. Cote (1977), 33 C.C.C. (2d) 353; 73 D.L.R. (3d) 752)

Therefore, the key element in setting out a count is the need to clearly identify the offence with which the defendant is charged.

Subsection (6) embodies this principle by stating that a count must contain sufficient detail of the alleged offence to give the defendant reasonable information about the act or omission charged, and to allow him to identify the transaction referred to.

Subsection (7) sets forth examples of matters which will not render a charge insufficient. For example, under clause (g) a count which charged a person with speeding on a highway would be sufficient if it gave the number of the highway and the approximate location, such as, "on highway 6, south of the town of Fergus." It is not necessary to give the precise number of miles, or to refer to township concession numbers. Obviously, the count would be insufficient if it merely stated "on highway 6", or said nothing at all about location. In that case, a defendant would not have reasonable information to prepare his defence.



Service of the Summons

27.—(1) A summons issued under section 23 or 25 shall,

- (a) be directed to the defendant;
- (b) set out briefly the offence in respect of which the defendant is charged; and
- (c) require the defendant to attend court at a time and place stated therein and to attend thereafter as required by the court in order to be dealt with according to law.

(2) A summons shall be served by a provincial offences officer by delivering it personally to the person to whom it is directed or if that person cannot conveniently be found, by leaving it for him at his last known or usual place of abode with an inmate thereof who appears to be at least sixteen years of age.

(3) Notwithstanding subsection 2, where the person to whom a summons is directed does not reside in Ontario, the summons shall be deemed to have been duly served seven days after it has been sent by registered mail to his last-known or usual place of abode

(4) Service of a summons on a corporation may be effected by delivering the summons personally;

(a) in the case of a municipal corporation, to the mayor, warden, reeve or other chief officer of the corporation or to the clerk of the corporation; or

(b) in the case of any other corporation, to the manager, secretary or other executive officer of the corporation or person apparently in charge of a branch office thereof,

or by mailing the summons by registered mail to the corporation at an address held out by the corporation to be its address, in which case the summons shall be deemed to have been duly served seven days after the day of mailing

(5) A justice upon application and upon being satisfied that service can not be made effectively on a corporation



in accordance with subsection 4, may by order authorize another method of service that has a reasonable likelihood of coming to the attention of the corporation.

(6) Service of a summons may be proved by statement under oath, written or oral, of the person who made the service.

Subsection (1) is derived from section 455.5(1) of the Criminal Code. It sets forth the necessary contents of the summons under Part III of the Act.

Subsection (2) requires personal service of the summons by a provincial offences officer. If the defendant cannot be found, the summons may be left at his last known or usual abode with an inhabitant who appears to be at least sixteen years of age.

Under subsection (3), if the person resides outside of Ontario, the summons may be served by registered mail to his last known or usual place of abode. He is deemed to have been served seven days after it was mailed.

Under subsection (4)(a), a municipal corporation may be served by serving the mayor, warden, reeve, or other chief officer, or the clerk. It will be up to the court to determine who is included in "other chief officer," but it is clear that this term indicates a person who exer-



cises managerial responsibilities on behalf of the municipal corporation.

Under subsection (4)(b), other corporations may be served by serving the manager, secretary, or other executive officer, or a person apparently in charge of a branch office. Also, registered mail will now be considered as valid personal service on the corporation.

Under subsection (5), where service on a corporation cannot be made by any of the above methods, then an application can be made to a justice who may by order authorize another method of service. Such an application would be ex parte, and should either be by evidence on the record or by affidavit setting out the attempts at service that have been made. It should also set out the alternative method of service sought by the applicant and indicate why it would have a reasonable likelihood of coming to the attention of the corporation. An example of an alternative service would be publication of a notice in the newspaper, as is regularly done in legal proceedings of a civil nature, or the posting of the summons on a construction site.

Under subsection (6), proof of service of a summons may be made either by sworn oral testimony or by affidavit. As a practical matter it would likely be done by affidavit attached to a copy of the summons.



SUMMARY

Part I Summons

- issued under s. 3(2)(b)
- generally issued and served on the spot
- can only be used by Provincial Officer
- uses certificate of offence procedure
- penalty limited by s. 12
- not confirmed by justice

- sets trial date
- requires court appearance or trial in absentia
- no prepayment option
- no plea guilty with explanation
- classes of cases serious enough to require treatment in open court but not serious enough to take it out of minor penalty range

Part III Summons (Before Information)

- issued under s. 23
- generally issued and served on the spot
- can only be used by Provincial Officer
- uses information procedure
- penalty limited by charging statute
- confirmed by a justice under s. 25(a) after issuance and only if information is sworn

- sets a trial date
- requires court appearance or trial in absentia
- no prepayment option
- no plea of guilty with explanation
- regular case where decision re charge is made on the spot

Part III Summons (After Information)

- issued under s. 25(1)(a)(ii)
- not issued on spot but personally served later
- can be issued by J.P. on sworn information of any member of public
- uses information procedure
- penalty limited by charging statute
- issued by J.P. only after information sworn

- sets a trial date
- requires court appearance or trial in absentia
- no prepayment option
- no plea of guilty with explanation
- regular case where officer needs more facts before deciding on correct charge
- regular case commenced by any member of the public



Proper Court

30.—(1) Subject to subsection 2, a proceeding in respect of an offence shall be heard and determined in the provincial offences court in whose territorial jurisdiction the offence occurred.

(2) A proceeding in respect of an offence may be heard and determined in the provincial offences court having territorial jurisdiction that adjoins that in which the offence occurred if,

(a) the court holds sittings in a place reasonably proximate to the place where the offence occurred; and

(b) the court and place of sitting referred to in clause a are named in the summons or offence notice.

(3) Where a proceeding is taken in a court other than one referred to in subsection 1 or 2, the court shall order that the proceeding be transferred to the proper court and may where the defendant appears award costs under section 61.

(4) Where, upon the application of a defendant or prosecutor made to the court named in the information or certificate, it appears to the court that,

(a) it would be appropriate in the interests of justice to do so, or

(b) both the defendant and prosecutor consent thereto,

the court may order that the proceeding be transferred to another court in Ontario.

(5) The court may, in an order made upon an application by the prosecutor under subsection 3 or 4, prescribe conditions that it thinks proper with respect to the payment of additional expenses caused to the defendant as a result of the change of venue.

(6) An order under subsection 3 or 4 may be made notwithstanding that any motion preliminary to trial has been disposed of or that the plea has been taken and it may be made at any time before evidence has been heard.



(7) The court to which proceedings are transferred under this section may receive and determine any motion preliminary to trial notwithstanding that the same matter was determined by the court from which the proceeding was transferred.

(8) Where an order is made under subsection 3 or 4, the clerk of the court in which the trial was to be held before the order was made shall deliver any material in his possession in connection with the proceedings forthwith to the clerk of the court before which the trial is ordered to be held, and all proceedings in the case shall be held or, if previously commenced shall be continued in that court.

For historical reasons, there has always been a strong presumption that a trial should be held in the county where the offence occurred. The Act maintains this in subsection (1), with the modification in subsection (2) which is intended to enhance the convenience of the parties. Thus, if a defendant commits an offence near the boundary of two counties, but the nearest court in the county in which the offence occurred is much further away than a court in the adjoining county, proceedings may be taken in the latter county. The defendant is protected from any possible abuse by the requirement that there not only be a more conveniently located court in the next county, but also that that particular court should be made the place of trial. As a practical matter, the choice of court will not be made by the defendant or the officer. The two adjoining courts will establish specific guidelines to decide where trials will be held.

Subsection (3) deals with the situation which arises when the informant brings proceedings in a court which does not have territorial jurisdiction over the offence.



Rather than force the informant to recommence proceedings, this provision allows the court in which they were erroneously brought to transfer them to the proper court. If the defendant has appeared in the court which was incorrectly chosen, the court may award costs to the defendant to be paid by the informant or the officer who issued the certificate. The subject of costs will be discussed more fully below. Therefore, there should be very few occasions when a proceeding is commenced elsewhere than in the proper court.

Subsection (4) creates a broad general power to change the place of trial, on consent of the parties or in any other case where it is appropriate in the interests of justice to do so. The consent provision is new. An example might be where a complicated environmental case was begun in Kapuskasing, but the head office of the corporation was in Toronto, and the expert witnesses and lawyers were from Toronto as well. This would be an obvious situation for change of venue, if the prosecution and the defendant consent. However, an ordinary speeding offence, where someone from Toronto is given an offence notice in Cornwall, would probably be a case for a transfer. The balance of convenience



would indicate that it is proper to try the case in the jurisdiction where the offence took place.

Subsection (6) reinforces the intention to remove the present restrictions on changes of venue; only after evidence has been heard will it be too late to transfer proceedings.

Subsection (7) ensures that the trial judge is not bound by a ruling of another judge made before a change of venue; the cardinal principle of the trial judge's control over proceedings is thus maintained.

Section 31 deals with situations where it becomes necessary to change justices in the course of a trial because of death, illness, or other reasons.

Section 32 makes it clear that the court retains jurisdiction over the information, even though there may have been procedural omissions or technical faults concerning adjournments.



v. The Concept of Mental Disorder

Introduction

With respect to judicial proceedings, the law requires persons to be present during their trial, and if a person is suffering from some mental incapacity which would prevent him from knowing and appreciating the nature and consequences of the proceedings, his mental incapacity would in effect prevent him from being present at his trial. To ensure a fair trial a person should not only be able to know and appreciate the nature and consequences of the proceedings against him but he should also be able to give instructions to counsel, so that any defence to the charge may be raised.

In addition to considering the mental ability of the defendant at the time of trial his mental ability at the time the offence was alleged to have been committed may also be relevant to the determination of whether or not the defendant did in fact commit the alleged offence.

The Provincial Offences Court is a statutory court. Consequently, any jurisdiction it has to deal with problems of mental disorder must be found either specifically or by necessary implication in legislation.

Section 45 and Comments

**45.—(1)** Where at any time before a defendant is sentenced a court has reason to believe, based on,

(a) the evidence of a legally qualified medical practitioner or, with the consent of the parties, a written report of a legally qualified medical practitioner; or

(b) the conduct of the defendant in the courtroom,



that the defendant suffers from mental disorder, the court may.

(c) where the justice presiding is a judge, by order suspend the proceedings and direct the trial of the issue as to whether the defendant is, because of mental disorder, unable to conduct his defence; or

(d) where the justice presiding is a justice of the peace, refer the matter to a judge who may make an order referred to in clause c.

(2) For the purposes of subsection 1, the court may order the defendant to attend to be examined under subsection 5.

(3) The trial of the issue shall be presided over by a judge and

(a) where he finds that the defendant is, because of mental disorder, unable to conduct his defence, he shall order that further proceeding on the charge be suspended.

(b) where he finds that the defendant is able to conduct his defence, he shall order that the suspended proceeding be continued

(4) At any time within one year after an order is made under subsection 3, either party may, upon seven days notice to the other, apply to a judge to rehear the trial of the issue and where upon the rehearing the judge finds that the defendant is able to conduct his defence, he may order that the suspended proceeding be continued

(5) For the purposes of subsection 1 or a hearing or rehearing under subsection 3 or 4, the court or judge may order the defendant to attend at such place or before such person and at or within such time as are specified in the order and submit to an examination for the purpose of determining whether the defendant is, because of mental disorder, unable to conduct his defence.



(6) Where the defendant fails or refuses to comply with an order under subsection 5 without reasonable excuse or where the person conducting the examination satisfies a judge that it is necessary to do so, the judge may by warrant direct that the defendant be taken into such custody as is necessary for the purpose of the examination and in any event for not longer than seven days and, where it is necessary to detain the defendant in a place, the place shall be, where practicable, a psychiatric facility.

(7) Where an order is made under subsection 3 and one year has elapsed and no further order is made under subsection 4, no further proceeding shall be taken in respect of the charge or any other charge arising out of the same circumstance.

When a defendant appears before a justice of the peace in the Provincial Offences Court, the justice may refer the matter to a judge when the justice has reason to believe that the defendant at the time of his appearance suffers from mental disorder. Whether the defendant suffers from mental disorder is a question of fact, and it should be noted that the justice does not have to find this fact but only needs to possess a "reason to believe." The "reason to believe" must be based on either (a) medical evidence, or (b) the conduct of the defendant in the court room.

#### Mental Disorder Defined

"Mental disorder" is not defined in The Provincial Offences Act. However, it is defined in The Mental Health Act, R.S.O. 1970, Chapter 269, which provides as follows:

Section 1(f): "Mental disorder means any disease or disability of the mind;"



A reference to the meaning of "mental disorder" may be found in a release of the Law Reform Commission of Canada titled Mental Disorder in the Criminal Process, Information Canada, Ottawa 1976, under the general heading, "Issue of Fitness" and the sub-heading, "Criteria of Unfitness," set out as follows:

"a person is unfit if, owing to mental disorders; (1) he does not understand the nature or object of the proceedings against him, or (2) he does not understand the personal import of the proceedings, or, (3) he is unable to communicate with counsel."

Although the definition of "mental disorder" provided in The Mental Health Act refers to any "disease of the mind" caution should be exercised in referring to the cases under Code s. 16, which also refers to a "disease of the mind", because "disease of the mind" referred to in the Code is qualified in that it has to be a disease of the mind to an extent that renders a person incapable of appreciating the nature and quality of the act or omission or knowing that the act or omission is wrong. The definition in The Mental Health Act is not so qualified.

#### Medical Evidence

Medical evidence can be given by a "legally qualified medical practitioner" either viva voce or with the consent of the parties by a written report of the legally qualified medical practitioner.

To obtain the medical evidence necessary to form a basis for the justice to have "reason to believe", the justice may order (Section 45(2)) that the defendant attend at such place or before such person and at or within such



times as is specified in the order and submit to an examination to determine whether the defendant suffers from mental disorder.

Courtroom Conduct of Defendant

In considering the conduct of the defendant in the courtroom as a basis for a justice having a "reason to believe" that the defendant suffers from mental disorder it should be noted that it has to be the conduct of the defendant "in the courtroom" that forms the basis for the justice to have "reason to believe" and not the conduct of the defendant at the time the offence was alleged to have been committed or as related to the justice by a prosecutor or some other person. The conduct in the courtroom should be such that the justice can observe or be privy to it himself. Justices should give consideration to the comments of the Law Reform Commission of Canada set out above and will feel that they have "reason to believe" if the defendant shows in the courtroom that he is unable to understand or communicate as suggested by the Law Reform Commission of Canada.

Statement of Reasons

If a justice does have reason to believe that a defendant suffers from mental disorder and intends to refer the matter to a judge, it is desirable that the justice put on the record the basis of his "reason to believe." If the basis for the justice's "reason to believe" is medical evidence he should state on the court record the medical evidence upon which he relies. If the basis for the justice's "reason to believe" is the conduct of the defendant in the court room then he should describe or explain on the court record the conduct upon which he relies.



### Jurisdiction

The jurisdiction of the justice of the peace to order the defendant to attend for examination is discretionary and must be exercised judicially. Although the statute does not require the justice before making an order for examination to have any material before him to base such an order, to act judicially, the justice should have some reason to make the order and must not act capriciously. The justice has no jurisdiction to order the defendant into custody for the purpose of such examination and if the defendant fails or refuses to comply with the justice's order the justice has no jurisdiction to issue a warrant for the arrest of the defendant. To enforce the order the matter has to be referred to a judge.

### Referring the Matter to a Judge

If a justice has "reason to believe" that the defendant suffers from mental disorder, Section 45(1)(d) requires the justice to refer the matter to a judge. Since The Provincial Courts Act requires a judge to exercise his jurisdiction in a Provincial Offences Court, the justice should "refer the matter to a judge" by adjourning the matter to a Provincial Offences Court that is presided over by a judge. The judge may be ordered to suspend the proceedings and direct the trial of the issue as to whether the defendant is, because of mental disorder, unable to conduct his defence.

If a defendant raises the issue of insanity as a defence to a charge, the justice is advised to adjourn the proceedings and seek guidance from a provincial judge.



### Continuation of Suspended Proceedings

After trial of the issue, where the judge finds that the defendant is able to conduct his defence he shall order that the suspended proceedings be continued.

Where the judge finds the defendant is, because of mental disorder, unable to conduct his defence, he shall order that further proceedings on the charge be suspended. He may rehear the matter within one year and upon such rehearing may order that the suspended proceedings be continued.

If the judge makes an order that the suspended proceedings be continued, the Act is silent as to whether the proceedings should be referred back to the justice for continuation. Section 45 provides that a justice may refer the matter to a judge "at any time before a defendant is sentenced." Section 31 provides that a justice presiding when evidence is first taken shall preside over the whole of the trial. It follows from these sections that if the matter was referred to a judge by a justice after the justice had first taken evidence, then the judge should refer the matter back to that justice for continuation. It is recommended that a justice who refers a matter to a judge clearly indicate to the judge the stage the proceedings are at.

### Appeals

Section 93 provides that when the proceeding is commenced by an information the defendant or the prosecutor may appeal to the County or District Court judge (all appeals from decisions of a provincial judge go to these courts) from a finding as to ability because of mental disorder to conduct a defence. Section 103 sets out the powers the County or District Court judge has when hearing an appeal from a finding regarding the ability because of mental



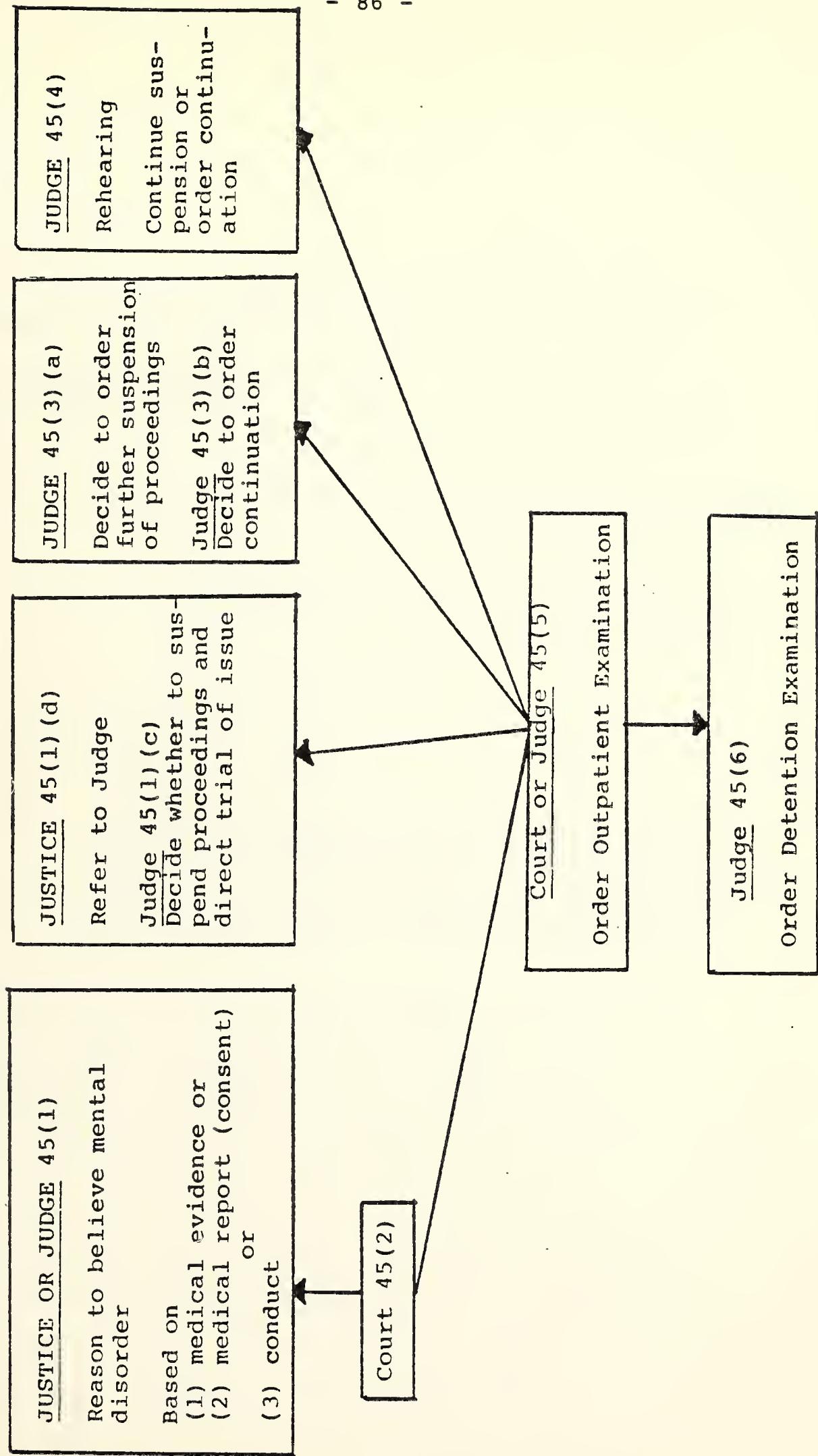
disorder to conduct a defence. Where the Appeal Court allows the appeal from a finding as to the ability because of mental disorder to conduct a defence it may order a "new trial" subject to Section 45. Section 109 provides that a "new trial" shall be held in a Provincial Offences Court presided over by a justice other than the justice who tried the defendant in the first instance.



DIAGRAM OF PROCEDURES CONCERNING ISSUE OF

DEFENDANT'S CAPACITY TO CONDUCT DEFENCE BECAUSE OF MENTAL DISORDER

- 86 -





## VI. The Trial

### Powers of Amendment

The following provisions apply to both Part I and Part III proceedings which result in a trial.

#### (a) Dividing Counts

34.—(1) A defendant may at any stage of the proceeding apply to the court to amend or to divide a count that,

- (a) charges in the alternative different matters, acts or omissions that are stated in the alternative in the enactment that creates or describes the offence; or—
- (b) is double or multifarious,

on the ground that, as framed, it prejudices him in his defence.

(2) Upon an application under subsection 2, where the court is satisfied that the ends of justice so require, it may order that a count be amended or divided into two or more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided

This section is derived from Code s. 519(2), and applies to a summons proceeding which would occur under Part I or Part III. Amendments can be made if the parties have had an opportunity to be heard.

Under section 39 of the Act, the court has jurisdiction to try two separate informations at the same time. The prosecutor has the right to join any number of counts in one information. However, it assumes a heavy responsibility and imposes upon the trier of fact a duty to



exercise extreme care not to be influenced by any evidence except that which relates to the particular count under consideration.

On a motion for separate trials, the test for the justice is whether he will have difficulty in distinguishing what is evidence on each count.

The usual grounds for separation of trials against more than one accused are as follows:

1. the defendants have antagonistic defences;
2. important evidence in favour of one of the defendants, which would be admissible on a separate trial, would not be allowed in a joint trial;
3. evidence which is incompetent against one defendant is to be introduced against another and that it would work prejudicially against the other defendant;
4. a confession made by one of the defendants if introduced and proved would be calculated to be prejudicial against the other defendants.



(b) Amendment of Information or Certificate

35.—(1) The court may, at any stage of the proceeding, amend the information or certificate as may be necessary if it appears that the information or certificate,

- (a) fails to state or states defectively anything that is requisite to charge the offence;
- (b) does not negative an exception that should be negatived; or
- (c) is in any way defective in substance or in form.

(2) The court may, during the trial, amend the information or certificate as may be necessary if the matters to be alleged in the proposed amendment are disclosed by the evidence taken at the trial.

(3) A variance between the information or certificate and the evidence taken on the trial is not material with respect to,

- (a) the time when the offence is alleged to have been committed, if it is proved that the information was laid or certificate issued within the prescribed period of limitation; or
- (b) the place where the subject-matter of the proceedings is alleged to have arisen, except in an issue as to the jurisdiction of the court.

(4) The court shall, in considering whether or not an amendment should be made, consider,

- (a) the evidence taken on the trial, if any;
- (b) the circumstances of the case;
- (c) whether the defendant has been misled or prejudiced in his defence by a variance, error or omission, and
- (d) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.



(5) The question whether an order to amend an information or certificate should be granted or refused is a question of law.

(6) An order to amend an information or certificate shall be endorsed on the information or certificate as part of the record and the trial shall proceed as if the information or certificate had been originally laid as amended.

These provisions are derived from the Criminal Code.

An important change is that, under subsection 1, a court is permitted to amend an information before trial, unlike the previous Criminal Code procedure. The thrust of this section is to ensure that the defendant is fully aware of the allegations against him while also ensuring that a minefield of technicalities is not constructed around the drafting of informations.

Where the information discloses no offence which is known to the law, the justice has no power to amend the information and proceed with the hearing. The proceedings taken on such an information are not an irregularity but a nullity.

The court on motion of the prosecutor may correct clerical errors or errors in the form of the information. The objection on these grounds by the defence should be taken before the plea in order to permit the court to amend the charge before the evidence is heard.



Any application to amend an information which is defective in that it does not conform to the evidence should not be heard until the court has first heard the evidence disclosing the matter to be alleged in the proposed amendment. If the Court fails to do so, it will be acting improperly, and, as a general rule, a conviction based on such an amended information will be quashed. If the requested amendment would substitute a different transaction from the first alleged or would render a different plea necessary, it ought not to be made.

The court, in considering whether or not to make the amendment, must also consider the evidence taken on the trial, the circumstances of the case, whether the defendant has been prejudiced by the defect in the charge, and whether the amendment will prejudice him in his defence. If the court is of the opinion that the defendant has been misled or prejudiced in his defence by the error or omission in the information which it proposes to amend, it may adjourn the trial.

If the objection to the information is that it is duplicitous, that is that it discloses more than one offence, it is clear that the court has power to amend. Section 34(1) of the Act permits a defendant to apply to the court to amend or divide a count that is double or multifarious.



It is suggested that if any amendment is allowed, other than a minor clerical error, the accused should be asked if he is prepared to proceed notwithstanding the amendment, and if he asks for an adjournment, it should be granted so that he may make full answer and defence to the charge. The court may award costs under section 38.

(c) Particulars

36. The court may, before or during trial, if it is satisfied that it is necessary for a fair trial, order that a particular, further describing any matter relevant to the proceedings, be furnished to the defendant.

The section follows Code s. 729(2).

A defendant who is unable to prepare his defence properly because the charge does not contain sufficient information may apply to the court for particulars. If the court is satisfied that such particulars are necessary to ensure a fair trial, it will order the prosecution to furnish the accused or his counsel with the particulars requested. The granting or refusing of particulars rests with the discretion of the court. A defendant is not entitled to particulars as a matter of right, and the ruling of the trial judge will not be disturbed by an appellate court where the discretion has not been abused.



The Court is not restricted in what particulars may be ordered, and may, in deciding whether or not a particular is required, give consideration to any evidence that has been taken.

When the Court orders particulars to be delivered, the particulars are then entered on the record. The trial will then proceed as if the information had been amended to conform with the particulars delivered, and if the Crown fails to prove the charge or count as particularized, the case must fail. If particulars are not delivered in accordance with the order the charge will be dismissed.

The minimum requirement of a certificate or information is that, whatever may be its mode of expression, not only shall it contain sufficient detail of the circumstances of the alleged offence to give the accused reasonable information as to the act or omission to be proved against him, but also it must identify the transaction referred to. Refer to section 13(2) and 13(3) at page 27. Provided that a certificate or information satisfies this two-fold test, and is referable to a single transaction, constituting an offence known to law, the absence or insufficiency of additional details is not material to the question of sufficiency.



(d) Motion to Quash Information or Certificate

37.—(1) An objection to an information or certificate for a defect apparent on its face shall be taken by motion to quash the information or certificate before the defendant has pleaded, and thereafter only by leave of the court.

(2) The court shall not quash an information or certificate unless an amendment or particulars under section 34, 35 or 36 would fail to satisfy the ends of justice.

Subsection (1) follows Code s. 732 (1). Subsection (2) reflects the recent decision of the Supreme Court of Canada in R. v. Sault Ste. Marie (1976), 30 C.C.C. (2d) 257 (Ont. C.A.); affd. (1978), 85 D.L.R. (3d) 161:

An information which is duplicitous or multifarious is not null or void but merely contains a defect apparent on its face within the section, and may be amended by the summary convictions court.

An objection is made by means of a motion to quash the information. If the Court finds that the information is defective, it may then either quash the information or amend it to cure the defect if the Crown so moves.

Certain details may be surplusage and if these are in error they may be deleted on a motion to amend. Since the charge is sufficiently particular and certain without them, it would not be quashed.

On the other hand, if the charge did not disclose an offence known to law it could not be amended, and, on



motion, would of necessity be quashed.

On a motion, the mover is permitted to present his position, the respondent may then present his position, and the mover is allowed to reply before the justice makes his finding.

(e) Joint Trials and Separate Trials

39.—(1) The court may, before trial, where it is satisfied that the ends of justice so require, direct that separate counts, informations or certificates be tried together or that persons who are charged separately be tried together.

(2) The court may, before or during the trial, where it is satisfied that the ends of justice so require, direct that separate counts, informations or certificates be tried separately or that persons who are charged jointly or being tried together be tried separately.

Subsection (1) expands the existing joinder provision by permitting separate informations or certificates to be tried together. In addition, several persons may be tried together, if the circumstances of the offence and the ends of justice require it. Subsection (2) establishes a broad power to grant separate trials.



(f) Irregularities

90.—(1) The validity of any proceeding is not affected by.

- (a) any irregularity or defect in the substance or form of the summons, warrant, offence notice, parking infraction notice, undertaking to appear or recognizance; or
- (b) any variance between the charge set out in the summons, warrant, parking infraction notice, offence notice undertaking to appear or recognizance and the charge set out in the information or certificate.

(2) Where it appears to the court that the defendant has been misled by any irregularity, defect or variance mentioned in subsection 1, the court may adjourn the hearing and may make such order as the court considers appropriate, including an order under section 61 for the payment of costs.

This section permits the court to overrule any objections to an irregularity in the summons, warrant, offence notice, etc. Its purpose is to prevent proceedings from being halted as a result of unimportant technicalities.

Costs

The old common law principle that the King shall neither pay nor receive costs developed in England when the prevailing political and legal doctrine equated the Crown with the State. This principle has been modified in Canada by Sections 744, 758, and 759 of the Criminal Code, which make provisions for costs in summary court matters.



These sections of the Code were further modified in Ontario by s. 10(1) and (2) of the former Summary Convictions Act. The costs-awarding powers for summary conviction matters existed to some degree in name only, because the courts were reluctant to award costs against the Crown. When used, these costs provisions have been interpreted restrictively to cover the very minimal fees and allowance contained in the schedule (Section 772) to the Code.

Under The Provincial Offences Act, costs may be awarded to the defendant in all deserving cases. The presiding justice may now award costs to either the Crown or the defendant.

The Act limits costs awarded for certificate offences at trial level, for or against a defendant, to fees and expenses reasonably incurred by or on behalf of witnesses, and to costs fixed by regulations. These amounts are subject to maxima established by regulations. The purpose in establishing these limits is to ensure that the minor nature of most provincial offences is reflected in any award of costs made by a justice. The statutory maximum of \$100.00 for proceedings commenced by a certificate of offence ensures that both the defendant and the state are not faced with awards of costs which are completely disproportionate to the gravity of the proceeding.



Costs may be awarded under section 30(3), when a proceeding is transferred to the proper court, under section 38, when particulars are ordered or the information or certificate is amended, and under section 90(2), when a defendant has been misled by any irregularity in the relevant document. These sections recognize that when a matter is transferred or adjourned, a defendant may be compensated to some degree for reasonable expenses.

Section 61 sets out the expenses for which costs may be awarded.

61.--(1) Upon conviction, the defendant is liable to pay to the court an amount by way of costs that is fixed by the regulations.

(2) The court may, in its discretion, order costs towards fees and expenses reasonably incurred by or on behalf of witnesses in amounts not exceeding the maximum fixed by the regulations, to be paid,

(a) to the court or prosecutor by the defendant; or

(b) to the defendant by the person who laid the information or issued the certificate, as the case may be,

but where the proceeding is commenced by means of a certificate, the total of such costs shall not exceed \$100.

(3) Costs payable under this section shall be deemed to be a fine for the purpose of enforcing payment.

Subsection (1) fixes a sum or fee as costs on conviction which will be established by regulation. These will be included in the set fine which is provided for many offences.



Subsection (2) gives the court discretion to order costs towards expenses incurred for witnesses. Awarding of costs against the defendant will occur most often where a trial date has been set and the defendant fails to appear. In this instance, the public or private prosecutor may be reimbursed for fees and expenses reasonably incurred by or on behalf of witnesses. Conversely, the defendant may be reimbursed by a private prosecutor if the prosecutor fails to appear at trial.

Costs may be awarded against a provincial offences officer. This would probably arise only in exceptional circumstances. Such costs should be awarded only when an officer acts negligently; and, accordingly, offends his public duty.

Section 91(e) empowers the Lieutenant Governor in Council to make regulations fixing the amount of costs which are payable upon conviction under section 61(1). Section 91(f) provides for regulations fixing the items for which costs may be awarded under section 61(2) and prescribing maximum amounts.



### Provisions Governing the Conduct of a Trial

The trial of a defendant for one or more provincial offences will take place when the person charged has been given a summons, or when he has been given an offence notice and has filed a plea of not guilty, under section 5(1). If a person who was given an offence notice does not plead not guilty within fifteen days; or does not plead guilty with an explanation; or does not pay the fine out of court, then a conviction will be entered by a justice of the peace without the defendant being present. Therefore, the number of ex parte trials will be greatly reduced, and police officers and other public officers usually will not be required to waste time in court reading evidence, when the defendant fails to appear.

### Witnesses

40.—(1) Where a justice is satisfied that a person is able to give material evidence in a proceeding under this Act, the justice may issue a subpoena requiring the person to attend to give evidence and bring with him any writings or things referred to in the subpoena.

(2) A subpoena shall be served and the service shall be proved in the same manner as a summons under section 27.

(3) A person who is served with a subpoena shall attend at the time and place stated in the subpoena to give evidence and, if required by the subpoena, shall bring with him any writing or other thing that he has in his possession or under his control relating to the subject-matter of the proceedings.

(4) A person who is served with a subpoena shall remain in attendance during the hearing and the hearing as resumed after adjournment from time to time unless he is excused from attendance by the presiding justice.



This section is derived from section 626 of the Criminal Code. Subsection (1) permits a justice to issue a subpoena requiring a person to attend court to give evidence. It also gives the justice power to compel the production of "things," in addition to writings, which may have been used in connection with the commission of the offence. This provision allows innocent third parties to continue to use items required at a trial right up to the time of trial.

Section 41 provides for the arrest of a witness in special situations, where a judge is satisfied that the person will otherwise not appear at the trial. The prosecutor must also satisfy the judge that the person is able to give material evidence that is "necessary" in a proceeding. A justice of the peace has no authority to issue a warrant for the arrest of a witness.

When a witness is arrested, subsection (3) requires the police officer to take him before a justice immediately. The justice can either release him on bail or order him kept in custody (subsection (4)). If a justice of the peace, rather than a judge, has ordered a person detained, then he must cause the person to appear before a judge within two days (subsection (5)). The judge must then decide to detain the person further, or to release him on bail (subsections (6) and (7)). In any case, the person



detained cannot be held longer than ten days from the date of the judge's decision (subsection (8)). If his evidence cannot be taken within this time, a judge, or the justice who is presiding at the trial, may order that the person's evidence be taken by a commissioner under section 44 of the Act (subsection (11)).

Section 42 permits a judge to issue an order for a person confined in custody to be brought before the court.

Penalty for Failure to Attend

43.—(1) Every person who, being required by law to attend or remain in attendance at a hearing, fails without lawful excuse to attend or remain in attendance accordingly is guilty of an offence and on conviction is liable to a fine of not more than \$1,000, or to imprisonment for a term of not more than thirty days, or to both.

(2) In a proceeding under subsection 1, a certificate of the clerk or a justice of the court before which the defendant is alleged to have failed to attend stating that the defendant failed to attend is admissible in evidence as *prima facie* proof of the fact without proof of the signature or office of the person appearing to have signed the certificate.

Section 43 replaces the finding of summary contempt under section 636 of the Criminal Code with an offence which must be tried like any other. Subsection (2) allows the court to accept an unsworn certificate of the clerk or a justice as prima facie proof of a defendant's failure to attend at a hearing when required by law to do so. In order to prove a witness's failure to attend, it would



be necessary to have a witness who was present give evidence at the trial that the witness did not attend.

Commission Evidence

The conditions for permitting the taking of evidence by a commissioner are set out in section 44. The application for an order may be made to a judge by preliminary motion before trial, or to a court during the trial. The usual situation where commission evidence will be used is where a witness cannot attend at court for medical reasons, or where he resides outside of Ontario and refuses to come to the trial.

Taking the Defendant's Plea

**46.**—(1) After being informed of the substance of the information or certificate, the defendant shall be asked whether he pleads guilty or not guilty of the offence charged therein.

(2) Where the defendant pleads guilty, the court may accept the plea and convict him.

(3) Where the defendant refuses to plead or does not answer directly, the court shall enter a plea of not guilty.



(4) Where the defendant pleads not guilty of the offence charged but guilty of any other offence, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept such plea of guilty and accordingly amend the information or substitute the offence to which the defendant pleads guilty.

The defendant may plead guilty or not guilty to the offence with which he is charged. If he refuses to plead, the court will enter a plea of not guilty and proceed to hear evidence. Subsection (4) permits the court to accept a plea of guilty to any other provincial offence, if the prosecutor consents. The other offence would have to have some real connection with the offence which is charged in the certificate or information. For example, on a charge of careless driving, the prosecutor might consent to a plea of guilty to a charge of an improper lane change. The other offence to which the defendant chooses to plead guilty does not have to be an "included" offence. Refer to the discussion of section 56 at page 110. for a definition of the term "included offence."

#### Evidence at the Trial

47. --(1) Subject to section 6, where the defendant pleads not guilty, the court shall hold the trial.

(2) The defendant is entitled to make his full answer and defence.



(3) The prosecutor or defendant, as the case may be, may examine and cross-examine witnesses.

(4) The court may receive and act upon any facts agreed upon by the defendant and prosecutor without proof or evidence.

(5) Notwithstanding section 8 of *The Evidence Act*, the defendant is not a compellable witness for the prosecution.

Both parties to a proceeding have the right to present their case and to examine and cross-examine witnesses. Subsection (4) permits the parties to agree upon certain or all facts at the trial. The court may act upon the facts agreed upon, but is not bound to do so. A typical situation might be where there is a change of justice during the course of a trial, under section 31.

Subsection (5) states that a defendant cannot be compelled to give evidence for the prosecution. The spouse of the defendant is, however, still compellable.

**48.—(1)** The court may receive and consider evidence taken before the same justice on a different charge against the same defendant, with the consent of the parties.

(2) Where a certificate as to the content of an official record is, by any Act, made admissible in evidence as *prima facie* proof, the court may, for the purpose of deciding whether the defendant is the person referred to in the certificate, receive and base its decision upon information it considers credible or trustworthy in the circumstances of each case.



(3) The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

Subsection (1) will permit a court which has acquitted the accused on one charge, for example, careless driving, to consider that evidence on a charge of following too closely under The Highway Traffic Act, if the prosecutor and defendant consent.

Subsection (2) is intended to assist the court in determining whether a person named in a document is the same person as the defendant. The court may base its decision upon information which it considers credible or trustworthy, even though it may not be evidence in the strict legal sense.

Section 49 deals with exhibits required at a hearing.

#### Prosecutors and Defendants

The definition of "prosecutor" in section 1(1)(h) of the Act includes the person who issues a certificate or lays an information, and includes counsel or agent acting



on behalf of either of them. Section 82 permits a defendant to act by his counsel or agent in all matters concerning provincial offences. Section 51(1) specifically permits a defendant to appear and act by counsel or agent at trial. Note that subsection (3) allows the court to bar an incompetent or irresponsible agent from appearing on behalf of a party.

Therefore, a defendant will ordinarily not be required to appear personally at a trial. This may be useful for persons who live a considerable distance from the court, but who would like to have someone appear at court to question the officer, or to make submissions.

**52.** Notwithstanding that a defendant appears by counsel or agent, the court may order the defendant to attend personally, and, where it appears to be necessary to do so, may issue a summons in the prescribed form.

Section 52 recognizes that in certain circumstances, for instance, a careless driving charge involving a serious injury, the court may desire to have a defendant appear in person.

Section 53 allows the court to exclude the defendant from a hearing where he is causing a serious disturbance, or is likely to be adversely affected by a judge's trial



of the issue of whether he is unable to conduct his defence because of mental disorder. Subsection (2) permits the court to exclude members of the public for certain specified reasons. Clause (c), allowing the exclusion of persons whose influence might affect the testimony of a witness, could be used where acquaintances of a witness may intimidate him from answering truthfully, by their mere presence in the court room.

Failure of Prosecutor to Appear

54.—(1) Where the defendant appears for a hearing and the prosecutor, having had due notice, does not appear, the court may dismiss the charge or may adjourn the hearing to another time upon such terms as it considers proper.

(2) Where the prosecutor does not appear at the time and place appointed for the resumption of an adjourned hearing under subsection 1, the court may dismiss the charge.

(3) Where a hearing is adjourned under subsection 1 or a charge is dismissed under subsection 2, the court may make an order under section 61 for the payment of costs.

(4) Where a charge is dismissed under subsection 1 or 2, the court may, if requested by the defendant, draw up an order of dismissal stating the grounds therefor and shall give the defendant a certified copy of the order of dismissal which is, without further proof, a bar to any subsequent proceedings against the defendant in respect of the same cause.



This section is designed to protect defendants from being harassed by private prosecutors. When a hearing is adjourned or the charge is dismissed, the court may make an order under section 61 for the payment to the defendant of reasonable expenses incurred by or on behalf of his witnesses. This section applies equally to a provincial offences officer who for no sufficient reason fails to appear at a hearing. If an officer finds that he will not be able to attend in court, he should make arrangements for an agent to attend.

Conviction ex parte

55.—(1) Where a defendant does not appear at the time and place appointed for a hearing and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that a summons was served, a notice of trial was given under Part I or II, an undertaking to appear was given or a recognizance to appear was entered into, as the case may be, or where the defendant does not appear upon the resumption of a hearing that has been adjourned, the court,

- (a) may proceed *ex parte* to hear and determine the proceedings in the absence of the defendant;
- (b) may, if it thinks fit, adjourn the hearing and issue a summons to appear or issue a warrant in the prescribed form for the arrest of the defendant; or
- (c) may, where the defendant does not appear in response to the summons or warrant on the date to which the hearing is adjourned, proceed under clause *a* or *b*.



(2) Where, the court proceeds under clause *a* of subsection 1, no proceeding arising out of the failure of the defendant to appear at the time and place appointed for the hearing or for the resumption of the hearing shall be instituted or if instituted shall be proceeded with, except with the consent of the Attorney General or his agent.

This section gives the court many of the powers which the summary convictions court had under the Criminal Code and The Summary Convictions Act. Subsection (1) permits the court to give the prosecutor an additional period of time to prove service of the relevant document, if he does not have proof of service in his possession. The justice may proceed ex parte to hear and determine the proceedings in the defendant's absence, or may adjourn the hearing and issue a summons or a warrant for his arrest.

Subsection (2) provides that if the court proceeds ex parte, no proceeding arising out of the defendant's failure to attend can be proceeded with, except with the consent of the Attorney General or his agent.

#### Included Offences

56. Where the commission of the offence charged includes the commission of another offence, the defendant may be convicted of an offence so included that is proved, notwithstanding that the whole offence charged is not proved.



This section follows the approach taken in the Criminal Code. In order to convict a defendant of an included offence, all the elements of that offence must be included in the description of the offence as charged. To give an example, it is an offence under section 3(1) of The Beach Protection Act for any person without a licence to take or carry away in any boat, vessel, craft, cart, truck, or other conveyance, any sand from a beach, in respect of which the Minister of Natural Resources has issued a licence to certain persons. If the prosecutor were unable to present enough evidence to prove that the person charged had himself carried away the sand, he still might be able to prove that the person had on board his vessel sand which had been taken from a licenced beach, contrary to section 5 of that Act. Therefore, the court could find that the defendant was guilty of the included offence of possession of sand. All the elements of the offence under section 5 are included in the description of the offence in section 3 of the statute.

To take another situation, careless driving does not include the offence of following too closely, because a person could be driving in a careless manner and yet be keeping a safe distance from vehicles ahead of him. However, under section 46(4), the prosecutor could consent to a plea of guilty on the charge of following too closely, since that section allows the defendant to plead guilty to "any other offence, whether or not it is an included offence." There are very few included offences under provincial statutes.



VI. Sentencing Powers and Procedures

Introduction

The sentencing provisions of the Act are based on the assumption that a fine is a flexible, inexpensive and appropriate means of conveying to the offender the community disapproval of his or her conduct. The Act attempts to resolve the present anomaly of large numbers of persons being jailed for failing to pay fines imposed for minor offences while extremely few persons are incarcerated for even serious provincial offences. By emphasizing the fine, the Act hopes to bring about drastic savings in the present process of detecting and arresting defaulters, while at the same time collecting the revenue from fines which is now lost when offenders are jailed for defaulting.

The Act removes imprisonment from the general penalty section, making it available as a sentencing option only where a particular Ministry establishes it in a particular statute. One example is the imposition of a term of imprisonment of up to six months for the offence of careless driving under section 83 of the Highway Traffic Act. This provision will not come into effect until January 1981, thus giving Ministries which now deliberately rely upon the general sanction for the penalty of imprisonment a chance to amend their statutes. The Act gives courts the power in exceptional



circumstances to relieve against minimum penalties set by the Legislature. See section 60(2), which states that the court must be of the opinion that "to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice."

Minimum fines may in these circumstances be replaced by a suspended sentence, minimum jail terms may be replaced by a fine of not more than \$2,000 in addition to the maximum fine provided for by the offence.

### Specific Provisions

s. 57:

<sup>Pre-sentence report</sup> 57.—(1) Where a defendant is convicted of an offence in a proceeding commenced by information, the court may direct a probation officer to prepare and file with the court a report in writing relating to the defendant for the purpose of assisting the court in imposing sentence.

<sup>Service</sup> (2) Where a report is filed with the court under subsection 1, the clerk of the court shall cause a copy of the report to be provided to the defendant or his counsel or agent and to the prosecutor.

Code S. 662 is modified by permitting a pre-sentence report to be prepared for a corporate offender.

<sup>Submissions as to sentence</sup> 58.—(1) Where a defendant who appears is convicted of an offence, the court shall give the prosecutor and the counsel or agent for the defendant an opportunity to make submissions as to sentence and, where the defendant has no counsel or agent, the court shall ask him if he has anything to say before sentence is passed upon him.

<sup>Omission to comply</sup> (2) The omission to comply with subsection 1 does not affect the validity of the proceeding.

<sup>Inquiries by court</sup> (3) Where a defendant is convicted of an offence, the court may make such inquiries, on oath or otherwise, of and concerning the defendant as it considers desirable, including his economic circumstances, but the defendant shall not be compelled to answer.



(4) A certificate setting out with reasonable particularity the finding of guilt or acquittal or conviction and sentence in Canada of a person signed by,

- (a) the person who made the adjudication; or
- (b) the clerk of the court in which the adjudication was made,

is, upon the court being satisfied that the defendant is the person referred to in the certificate, admissible in evidence and is *prima facie* proof of the facts stated therein without proof of the signature or the official character of the person appearing to have signed the certificate.

Subsections (1) and (2) are derived from Code s. 595. Subsection (1) compels the court to give both the prosecutor and the defendant an opportunity to make submissions as to sentence.

Subsection (3) gives the court the discretion to inquire into the defendant's economic circumstances. It attempts to ensure that no one will be imprisoned for inability to pay a fine. Information obtained under this provision will be relevant to the quantum of the fine and to the initial determination of the amount of time which should be granted to pay a fine.

Subsection (4) is similar to Code s. 594(1). A certificate of previous conviction is prima facie proof of the existence of those facts.

59. In determining the sentence to be imposed on a person convicted of an offence, the justice may take into account any time spent in custody by the person as a result of the offence.



This section is similar to Code s. 649(2.1); it expressly authorizes the sentencing justice to consider time spent in custody prior to sentencing, but leaves an area of judicial discretion.

**60.--(1)** No penalty prescribed for an offence is a minimum penalty unless it is specifically declared to be a minimum.

(2) Notwithstanding that the provision that creates the penalty for an offence prescribes a minimum fine, where in the opinion of the court exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice, the court may impose a fine that is less than the minimum or suspend the sentence.

(3) Where a minimum penalty is prescribed for an offence and the minimum penalty includes imprisonment, the court may, notwithstanding the prescribed penalty, impose a fine of not more than \$2,000 in lieu of imprisonment.

S. 60 recognizes that while minimum fines are a valid form of legislative direction to the courts, any absolute provision must create hardship in extraordinary cases. It therefore gives the court a tightly restricted power to relieve against minimum fines. This power should not be exercised casually.

Subsection (1) is derived from Code s. 645(2).

Subsection (2) is new.

Subsection (3) is derived from s. 12 of The Summary Convictions Act.



**61.**—(1) Upon conviction, the defendant is liable to pay to the court an amount by way of costs that is fixed by the regulations

(2) The court may, in its discretion, order costs towards fees and expenses reasonably incurred by or on behalf of witnesses in amounts not exceeding the maximum fixed by the regulations, to be paid,

(a) to the court or prosecutor by the defendant; or

(b) to the defendant by the person who laid the information or issued the certificate, as the case may be,

but where the proceeding is commenced by means of a certificate, the total of such costs shall not exceed \$100.

(3) Costs payable under this section shall be deemed to be a fine for the purpose of enforcing payment.

Please refer to the pages on 'Costs.' (pp. 96 to 99 )

**62.**—(1) Except where otherwise expressly provided by law, every person who is convicted of an offence is liable to a fine of not more than \$2,000 or to imprisonment for a term of not more than six months, or to both.

(2) Subsection 1 is amended by striking out "or to imprisonment for a term of not more than six months, or to both" in the third and fourth lines.

(3) Subsection 2 does not come into force until the 1st day of January, 1981.

Under subsection (1), the maximum fine is \$2,000.

Subsection (2) eliminates the term of imprisonment as a generally available penalty; this reflects the fact that incarceration is an inappropriate form of punishment for most provincial offences.

Under subsection (3), the elimination of imprisonment



as a general residual sentencing power will not take effect until January 1981, thus giving the legislature an opportunity to amend existing statutes to incorporate imprisonment where this penalty is considered to be appropriate.

Minute of conviction

63. Where a court convicts a defendant or dismisses a charge, a minute of the dismissal or conviction and sentence shall be made by the court, and, upon request by the defendant or the prosecutor or by the Attorney General or his agent, the court shall cause a copy thereof certified by the clerk of the court to be delivered to the person making the request.

This section is based upon Code s. 741(1) and s. 793(1). This section provides a bar to subsequent proceedings arising out of the same circumstances.

Time when imprisonment starts

64.—(1) The term of imprisonment imposed by sentence shall, unless otherwise directed in the sentence, commence on the day on which the convicted person is taken into custody thereunder, but no time during which the convicted person is imprisoned or out on bail before sentence shall be reckoned as part of the term of imprisonment to which he is sentenced.

Item

(2) Where the court imposes imprisonment, the court may order custody to commence on a day not later than thirty days after the day of sentencing.



Subsection (1) prevents the court from reckoning time spent in custody by the defendant before sentence as part of the term of imprisonment.

Subsection (2) modifies section 23 of The Summary Convictions Act from which subsection (1) is derived, by permitting the court to postpone the commencement of sentence. This is intended to permit the court to give the defendant a chance to organize his personal affairs before commencing a jail term.

**65.** Where a person is subject to more than one term of imprisonment at the same time, the terms shall be served consecutively except in so far as the court has ordered a term to be served concurrently with any other term of imprisonment.

This reverses the present law, which permits scofflaws to erase hundreds of dollars of parking fines by serving one sentence of two days. The purpose of the reversal is to encourage the payment of fines instead of allowing these persons to avoid payment by serving short jail terms. The result of the present situation is to deprive the community of the fine revenue while causing the community to incur the substantial costs of incarcerating the offender.

**66.—(1)** A warrant of committal is sufficient authority,

(a) for the conveyance of the prisoner in custody for the purpose of committal under the warrant; and

(b) for the reception and detention of the prisoner by keepers of prisons in accordance with the terms of the warrant.

(2) A person to whom a warrant of committal is directed shall convey the prisoner to the correctional institution named in the warrant.

(3) A sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the prisoner is sentenced.



Subsection (2) allows an individual other than the one named on the warrant to convey the prisoner. This makes it possible for people other than police officers, such as civilian employees of a police department, to convey prisoners.

Subsection (2) follows the provisions of Code s. 661 in imposing a statutory duty to obey the order of the court for the conveyance of the prisoner into custody.

87.—(1) A fine becomes due and payable fifteen days after its imposition.

(2) Where the court imposes a fine, the court shall ask the defendant if he wishes an extension of the time for payment of the fine.

(3) Where the defendant requests an extension of the time for payment of the fine, the court may make such inquiries, on oath or otherwise, of and concerning the defendant as the court considers desirable, but the defendant shall not be compelled to answer.

(4) Unless the court finds that the request for extension of time is not made in good faith or that the extension would likely be used to evade payment, the court shall extend the time for payment by ordering periodic payments or otherwise.

(5) Where a fine is imposed in the absence of the defendant, the clerk of the court shall give the defendant notice of the fine and its due date and of his right to apply for an extension of the time for payment under subsection 6.

(6) The defendant may, at any time by application in the prescribed form filed in the office of the court, request an extension or further extension of time for payment of a fine and the application shall be determined by a justice and the justice has the same powers in respect of the application as the court has under subsections 3 and 4.



Subsection (1) gives all offenders a fifteen-day period to pay their fines, again being designed to ensure that payment of the fine is made whenever possible.

Subsections (2) to (4) empower and strongly direct the sentencing justice to extend time for payment in all but extreme cases. The provision for periodic payment in subsection (4) furthers this objective.

Subsection (5) ensures that the defendant who is convicted at a trial held in his absence is notified of his obligations and rights.

Subsection (6) allows a defendant, whether or not he has been granted an extension of time by the sentencing justice, to apply at any time to the court office for an extension by provision for periodic payments. The application will be in writing in a form provided at the court office. The applicant will not attend before the justice unless the justice, in exceptional circumstances, after reviewing the written submission, decides that an interview is essential. On so deciding he may then ask the defendant to attend at the office, although he will have no power to compel him to do so. In appropriate cases, the justice can grant short extensions of time, thus requiring an offender to frequently establish his inability to pay. There is no limit on the number of applications which can be brought, nor is there any restriction on bringing an application after a warrant of committal for default has been issued. The object is to have the offender honestly endeavour to recognize and satisfy his debt to the community, rather than employ an inappropriately harsh and expensive punishment on someone who cannot pay a fine when it falls due.



**68.** The Lieutenant Governor in Council may make regulations establishing a program to permit the payment of fines by means of credits for work performed, and, for the purpose and without restricting the generality of the foregoing may,

- (a) prescribe classes of work and the conditions under which they are to be performed;
- (b) prescribe a system of credits;
- (c) provide for any matter necessary for the effective administration of the program,

and any regulation may limit its application to any part or parts of Ontario.

This section provides for the creation of a fine option programme in Ontario. In areas where the administrative machinery is available, it permits an impecunious defendant to work off his fine rather than go to jail.

**71.** Where an Act provides that a fine may be suspended subject to the performance of a condition,

- (a) the period of suspension shall be fixed by the court and shall be for not more than one year;
- (b) the court shall provide in its order of suspension the method of proving the performance of the condition;
- (c) the suspension is in addition to and not in lieu of any other power of the court in respect of the fine; and
- (d) the fine is not in default until fifteen days have elapsed after notice that the period of suspension has expired is given to the defendant.



This provision is intended to empower the expansion of a highly successful concept which was pioneered at the North York Traffic Tribunal. It is felt that in certain cases the community is better off if the offender, rather than paying a monetary penalty, learns not to commit the offence again. Thus a driving offender could have the option of attending a driver safety course instead of paying a fine; hunters could attend hunter safety courses.

Because of the varying nature of the conditions which could be imposed in lieu of a fine, and the need to ensure that facilities are in place to cope with persons sentenced under this section, the Act is enabling, leaving it for individual ministries to prescribe the appropriate details. Once a ministry does so, this section will empower justices to impose the conditions where appropriate, with this section setting out the basic procedural guidelines.

#### Probation

72.--(1) Where a defendant is convicted of an offence in a proceeding commenced by information, the court may, having regard to the age, character and background of the defendant, the nature of the offence and the circumstances surrounding its commission,

- (a) suspend the passing of sentence and direct that the defendant comply with the conditions prescribed in a probation order;
- (b) in addition to fining the defendant or sentencing him to imprisonment, whether in default of payment of a fine or otherwise, direct that the defendant comply with the conditions prescribed in a probation order; or
- (c) where it imposes a sentence of imprisonment on the defendant, whether in default of payment of a fine or otherwise, that does not exceed ninety days, order that the sentence be served intermittently at such times as are specified in the order and direct that the defendant, at all times when he is not in confinement pursuant to such order, comply with the conditions prescribed in a probation order.



(2) A probation order shall be deemed to contain the conditions that,

- (a) the defendant not commit the same or any related or similar offence, or any offence under a statute of Canada or Ontario or any other province of Canada that is punishable by imprisonment;
- (b) the defendant appear before the court as and when required; and
- (c) the defendant notify the court of any change in his address.

(3) In addition to the conditions set out in subsection 2, the court may prescribe the following conditions in a probation order,

- (a) that the defendant satisfy any compensation or restitution that is required or authorized by an Act;
- (b) with the consent of the defendant and where the conviction is of an offence that is punishable by imprisonment that the defendant perform a community service as set out in the order;
- (c) where the conviction is of an offence punishable by imprisonment, such other conditions relating to the circumstances of the offence and of the defendant that contributed to the commission of the offence as the court considers appropriate to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant; or
- (d) where considered necessary for the purpose of implementing the conditions of the probation order, that the defendant report to a responsible person designated by the court and, in addition, where the circumstances warrant it, that the defendant be under the supervision of the person to whom he is required to report.

(4) A probation order shall be in the prescribed form and the court that makes the order shall specify therein the period for which it is to remain in force, which shall not be for more than two years from the date when the order takes effect.



(5) Where the court makes a probation order, it shall cause a copy of the order and a copy of section 75 to be given to the defendant.

(6) The Lieutenant Governor in Council may make regulations governing restitution, compensation and community service orders, including their terms and conditions.

Subsections (1) and (2) are self-explanatory. Subsection (3)(a) is another enabling section which recognizes that the great diversity of provincial offences precludes the creation of restitution procedures and limitations applicable to all. Nor is it intended to make the Provincial Offences Court a forum for the collection of damages in civil matters. Therefore, it is left to individual ministries to make restitution applicable to offences for which they consider it appropriate. Since most provincial offences differ from criminal law in that there is not often an identified individual who is the victim, restitution will not have the same significance as it can in criminal proceedings.

The remainder of the section, with the exception of subsections (3)(b) and (6), is self-explanatory. Those provisions again recognize that a basic difference between criminal and provincial offences is that very few persons convicted of the latter are incarcerated. It follows that community service, which is generally a substitute for incarceration, does not have the same relevance as it does in criminal proceedings. Because, however, it may have a role to play in the more serious provincial offences, regulations covering the myriad of details essential for a community service programme will follow the enactment of this Act.

74. The court may, at any time upon the application,  
- of the defendant or prosecutor with notice to the other,  
after a hearing or, with the consent of the parties, without a  
hearing,



- (a) make any changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in circumstances;
- (b) relieve the defendant, either absolutely or upon such terms or for such period as the court considers desirable, of compliance with any condition described in any of the clauses in subsection 3 of section 72 that is prescribed in the order; or
- (c) terminate the order or decrease the period for which the probation order is to remain in force.

and the court shall thereupon endorse the probation order accordingly and, if it changes or adds to the conditions prescribed in the order, inform the defendant of its action and give him a copy of the order so endorsed

This section is self-explanatory.

75. Where a defendant who is bound by a probation order is convicted of an offence constituting a breach of condition of the order and,

- (a) the time within which he may appeal or apply for leave to appeal against that conviction has expired and he has not taken an appeal or applied for leave to appeal;
- (b) he has taken an appeal or applied for leave to appeal against the conviction and the appeal or application for leave has been dismissed or abandoned; or
- (c) he has given written notice to the court that convicted him that he elects not to appeal.

or where the defendant otherwise wilfully fails or refuses to comply with the order, he is guilty of an offence and upon conviction the court may,



- (d) impose a fine of not more than \$1,000 or imprisonment for a term of not more than thirty days, or both, and in lieu of or in addition to the penalty, continue the probation order with such changes or additions and for such extended term, not exceeding an additional year, as the court considers reasonable; or
- (e) where the justice presiding is the justice who made the original order, in lieu of imposing the penalty under clause d, revoke the probation order and impose the sentence the passing of which was suspended upon the making of the probation order.

This section forces the Crown to elect between charging the offender with the offence of breaching probation or having him sentenced for the original offence. To achieve the second alternative, the Crown must take the offender before the justice who originally sentenced him.



## Procedures in Default of Payment of a Fine

### Introduction

Under Code sections 645 and 646 (1), a warrant for the arrest of the offender is issued when a fine goes into default. This warrant must be processed by the court office and the police, who then must utilize highly-paid officers to attempt to execute the warrant. When the offender is found, he or she must be processed by the correctional institution, with incarceration costing the taxpayer approximately forty-eight dollars per day. As well, the province loses the revenue from the uncollected fine.

### Remedying the Mischief

The basic thrust of the Act is an attempt to keep fines from being in default and to end the automatic issuance of a warrant of committal when they are. If the offender does default, the court has a number of options at its disposal to maintain the integrity of the administration of justice.

The Act directs the justice to first order the suspension, non-issuance or non-renewal of any permit, licence, registration or privilege in respect of which suspension is authorized by any Act for non-payment of the fine. At present, only the Act governing driving and motor vehicles authorize suspensions for this purpose, but it is expected that other acts will follow this lead. Once a person's licence is suspended, it will not be renewed until the fine is paid; further penalties including incarceration can result from carrying on the licenced activity without a licence.

The Act also permits a justice to direct the court clerk to file a civil judgment against the offender. This is enforceable in the same manner as any court-ordered payment; if need be the defendant's assets can be sold to satisfy



the fine.

Only when any available suspensions have been tried and have failed, and where the justice decides that civil enforcement or any other reasonable means of collecting the fine would not likely prove successful in a reasonable period of time, can a warrant be issued for the arrest and detention of the offender. Before this can be done the offender will have to be given notice that the justice was intending to issue a warrant. See s. 87 concerning notice. The defendant could then appear and make representations to the justice as to why a warrant should not issue. Even after a warrant is issued, the defendant can apply for further extensions of time which can be granted in appropriate circumstances, thus postponing the execution of the warrant.

However, if an offender is incarcerated, he or she will no longer be able to satisfy all outstanding fines by a Friday night to Saturday morning jail appearance. Jail in default will consist of a minimum of three days plus 1 day for each \$25.

Although the Act greatly minimizes the use of jail as a sanction for non-payment, it does not eliminate it. This flows from the fact that the fine is not like a civil debt; it is a punishment, one of the purposes of which is to deter the offender and others from similar conduct. The means of collecting the fine can therefore be, in appropriate cases, onerous. Under the Act, virtually nothing short of wilful non-payment will result in incarceration, but the offender who creates this situation for himself has no valid complaint when he finds that incarceration for non-payment is now a very substantial penalty indeed.



Civil Enforcement

**69.**—(1) When the payment of a fine is in default, the clerk of the court may complete a certificate in the prescribed form as to the imposition of the fine and the amount remaining unpaid and file the certificate in a court of competent jurisdiction and upon filing, the certificate shall be deemed to be an order or judgment of that court for the purposes of enforcement.

(2) A certificate shall not be filed under subsection 1 after two years after the default in respect of which it is issued.

(3) Where a certificate has been filed under subsection 1 and the fine is fully paid, the clerk shall file a certificate of payment upon which the certificate of default is discharged and, where a writ of execution has been filed with the sheriff, the clerk shall file a certificate of payment with the sheriff, upon which the writ is cancelled.

This follows from the power created in s. 70(2). It permits a defaulted fine to be collected in the same manner as any civil judgment debt. Thus, in appropriate cases, assets of a defaulting offender could be seized and sold to satisfy the fine. For practical reasons this option will not be used in most cases involving small amounts; it is useful for collecting large fines levied against corporations.

**70.**—(1) The payment of a fine is in default when any part of the fine is due and unpaid for fifteen days or more.

(2) Where a justice is satisfied that payment of a fine is in default, the justice,

(a) shall order that any permit, licence, registration or privilege in respect of which a suspension is authorized by or under any Act for non-payment of the fine be suspended, not renewed or not issued until the fine is paid; and

(b) may direct the clerk of the court to proceed with civil enforcement under section 69.



(3) A justice may issue a warrant in the prescribed form for the committal of the defendant where,

- (a) an order or direction under clause a of subsection 2 has not resulted in payment within a time that is reasonable in the circumstances;
- (b) all other reasonable methods of collecting the fine have been tried and failed or, in the opinion of the justice, would not likely result in payment within a reasonable time in the circumstances; and
- (c) the defendant has been given fifteen days notice of the intent to issue a warrant and has had an opportunity to be heard.

(4) In exceptional circumstances where, in the opinion of the court imposing the fine, to proceed under subsection 3 would defeat the ends of justice, the court may,

- (a) order that no warrant of committal be issued under subsection 3; or
- (b) order imprisonment in default of payment of the fine and that no extension of time for payment be granted.

(5) Imprisonment under a warrant issued under subsection 3 or 4 shall be for three days, plus one day for each \$25 or part thereof that is in default, subject to a maximum period of,

- (a) ninety days; or
- (b) half of the maximum imprisonment, if any, provided for the offence,

whichever is the greater.

(6) Any payment made after a warrant is issued under subsection 3 or 4 shall reduce the term by the number of days that is in the same proportion to the number of days in the term as the amount paid bears to the total fine and no amount offered in part payment of a fine shall be accepted unless it is sufficient to secure reduction of sentence of one day, or a multiple thereof.



Under subsection (2)(a), the justice shall suspend any permit, licence, registration, or privilege. Please note that there is no need for a judicial order before reinstating a licence or privilege which has been suspended. This permits administrative reinstatement as soon as the fine has been paid, thus providing speedier service to the public.

Under subsection (2)(b), the justice may direct civil enforcement of the defaulted fine.

Under subsection (3), a justice may issue a warrant if one of the circumstances mentioned in the section is met.

Subsection (4) gives the justice discretion to either not order a warrant or to order imprisonment in exceptional circumstances, in the context of a conviction at trial. It does not apply when the justice is dealing with a fine previously imposed which is now in default.

Subsection (5) is intended to discourage scofflaws who run up hundreds of dollars of fines and eliminate them by spending Friday night and Saturday morning in jail. Under this subsection, imprisonment would be for a minimum of three days.

Subsection (6): The following example illustrates the effect of payments made after a warrant of committal has been issued:

Defendant is fined \$100  
Defendant pays only \$ 50  
After 30 days, \$ 50 is in default.

A warrant is issued under section 70(4)(b)  
for 5 days imprisonment (3 days + 1 day for  
each \$25 in default = 3 + 2 = 5) -section 70(5)



Defendant is taken to jail and pays \$20.

Term of imprisonment is reduced by:

amount paid    x number of days in term  
total fine

$$\frac{20}{100} \times 5 = 1 \text{ day}$$

Therefore defendant remains in jail for 4 days.

Note that the amount of the total fine is used to calculate the reduction in jail time, not the amount in default.



## VIII. The Exercise of Judicial Discretion

### Introduction

There are a number of areas in The Provincial Offences Act in which the justice of the peace has substantially more discretionary powers than he formerly had under the Criminal Code. In most cases, charges under The Provincial Offences Act are heard in a Provincial Offences Court presided over by a justice. This means that, while a justice is acting under the general supervision of a judge of the Provincial Court (Criminal Division), he is the presiding judicial officer in the court of first instance. If his decision is not appealed to a provincial court judge or reviewed by the High Court, it will be binding. The justice should, therefore, be aware of the degree of discretionary power he has, and when it is available to him.

### Definition

Discretionary powers, as defined by the Law Reform Commission of Canada in "A Catalogue of Discretionary Powers in the Revised Statutes of Canada" (Information Canada, 1970), p. 2, are the following:

discretionary powers for the purposes of this study are taken to include any decision in which the result is not predetermined by statute. They therefore comprise decisions involving a choice whether to exercise a power, decisions concerning the manner in which power is to be exercised and, as well, any matter involving judgment, for example, a decision as to whether a particular set of circumstances exists or has existed.



Jowitt's Dictionary of English Law (p. 639) defines discretion as:

a man's own judgment as to what is best in a given case, as opposed to a rule governing all cases of a certain kind.

When Judicial Discretion is Available

As stated above, discretion is available any time a decision is not predetermined by statute. Any sections of the Act containing the following words or phrases delegate an element of discretion to the presiding judicial officer:

(a) 'may' - s. 49(1) states:

49.—(1) The court may order that an exhibit be kept in such custody and place as, in the opinion of the court, is appropriate for its preservation.

S. 30(16) of The Interpretation Act, R.S.O. 1970, c. 225, states that the word "may" shall be construed as permissive. According to nineteenth century British law, however, if a judge proceeds on a wrong principle in a matter within his discretion, his order may be set aside by an appellate court: Watson v. Rodwell (1876), 3 Ch.D. 380. An example of a wrong principle would be where a justice displayed an obvious bias against the accused.

(b) phrases such as "where a justice is satisfied" (s. 40(1)), "a court has reason to believe" (s. 45(1)), "in the opinion of the court" (s. 60(2)), and "in its discretion" (s. 61(2)) sometimes accompany the word "may" and are useful indicia of the presence of judicial discretion.



When Discretionary Powers are not Available

Discretionary powers are not available or severely limited when the statute sets out the result flowing from a given set of facts. Discretion is non-existent, for example, when the statute uses the word "shall". In s. 67(2), the Act states: "where the court imposes a fine, the court shall ask the defendant if he wishes an extension of the time for payment of the fine." The Interpretation Act, supra, s. 30(34) states "shall" shall be construed as imperative. See also R. v. Goertzer (1949), 9 C.R. 79, 2 W.W.R. 1208 (Man.), where a "shall" requirement was held to be imperative.

Discretionary powers are severely limited in cases where the Act outlines a limited number of choices available to the judicial officer. For example, s. 44(2) states:

**44. (2)** Evidence taken by a commissioner appointed under subsection 1 may be read in evidence in the proceeding if,

- (a) it is proved by oral evidence or by affidavit that the witness is unable to attend for a reason set out in subsection 1;
- (b) the transcript of the evidence is signed by the commissioner by or before whom it purports to have been taken; and
- (c) it is proved to the satisfaction of the court that reasonable notice of the time and place for taking the evidence was given to the other party, and the party had full opportunity to cross-examine the witness.

In this section, evidence taken by a commissioner may be read in evidence if and only if certain conditions precedent are met.



### Use of Discretionary Powers

By definition, discretionary powers give judicial officers the right to make binding decisions. These powers, however, do not give the justice carte blanche to decide anything he wishes; his decision should concur with the objectives of the Act and general principles of law.

The main objectives of the Act are:

- (a) to replace the old summary convictions procedure for the prosecution of provincial offences with a new procedure that reflects the difference between provincial offences and criminal offences;
- (b) to create a clear, self-contained procedural code to simplify procedures, eliminate technicalities, enhance procedural rights and protections and remove the obstacle of delay from the assertion of rights and the collection of fines;
- (c) to bring flexibility to the defendant's options, as well as reduce the costs of holding criminal-style trials in all cases in which the defendant has not pleaded in his fine;
- (d) to simplify appeals;
- (e) to replace imprisonment as a form of sentencing with the civil enforcement of fines.

An overriding principle of law, which should guide the justice's use of discretion, is the presumption of innocence on the part of the accused.



In short, discretion is "to discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion." (Co. Litt. 227b).



IX. Appeal and Review in the Provincial Offences Act, 1979

Introduction

Under the Criminal Code, provisions governing an appeal from the trial of an offence punishable on summary conviction are set out in Part XXIV. It is there provided that an appeal may be taken either to an appeal court, meaning a county or district court in Ontario, or by way of stated case to the Supreme Court.

Appeal procedure where a proceeding is commenced by information under Part III of The Provincial Offences Act differs to an extent from the previous Code provisions. If the Part III trial is presided over by a justice of the peace, the appeal is to be to a judge of the provincial court (criminal division). If the Part III trial is presided over by a provincial judge, the appeal will continue to be, as in the Code, to the county court. In both instances under Part III, the appeal will be identical in form and nature; the only difference lies in the judicial officer who presides over the appeal.

This change enhances the access of members of the public to appellate remedies. The provincial court is both geographically and practically more accessible to the average citizen. In particular, defendants may be represented by an agent in the provincial court (but only by a lawyer in



the county court). Moreover, having the provincial judge hear all appeals from the local justices of the peace will significantly augment the supervisory function of the provincial judge. That supervisory function is a very important method of assuring the direction of the justices of the peace who preside over provincial offences.

All appeals in a proceeding commenced by certificate under Parts I and II will be heard in a provincial court (criminal division). The appeal is as of right to a provincial court which will proceed by way of an informal review. The only difference between a Part I and II appeal as opposed to a Part III is that the latter includes appeals from a finding on the issue of mental disorder. In addition, there is a further level of appeal to the Court of Appeal on any question of law alone, as well as to sentence in Part III proceedings only. This affords the benefit of the highest court in the province ruling upon important questions arising out of the operation of this Act.

#### Sections and Comments

##### 92.—(1) In this Part.

(a) "counsel" when used in respect of proceedings in a provincial court (criminal division) includes an agent;

(b) "court" means the court to which an appeal is or may be taken under this Part;

(c) "judge" means a judge of the court to which an appeal is or may be taken under this Part;

(d) "rules" means the rules made under section 123;

(e) "sentence" includes any order or disposition consequent upon a conviction and an order as to costs.



(2) In this Part, a reference to the Court of Appeal means the Court of Appeal notwithstanding subsection 2 of section 17 of *The Judicature Act*.

Subsection (1)(a) permits an agent to appear when a Part III appeal is taken to the provincial court (criminal division).

Subsection (2) clarifies the intent that the subsequent appeal be to the Court of Appeal rather than to the Divisional Court.

### Appeals under Part III

93.—(1) Where a proceeding is commenced by information under Part III, the defendant or the prosecutor or the

Attorney General by way of intervention may appeal from a conviction or dismissal or from a finding as to ability, because of mental disorder, to conduct a defence or as to sentence.

(2) An appeal under subsection 1 shall be,

(a) where the appeal is from the decision of a justice of the peace, to the provincial court (criminal division) of the county or district in which the adjudication was made; or

(b) where the appeal is from the decision of a provincial judge, to the county or district court of the county or district in which the adjudication was made.

(3) The appellant shall give notice of appeal in such manner and within such period as is provided by the rules.

Under subsection (1) appeals may be from conviction, dismissal, or sentence, as well as a finding as to ability to conduct a defence because of mental disorder. This



finding as to ability to conduct a defence because of a mental disorder may only be made by a judge by virtue of section 45; thus, the appeal must be governed by subsection (3)(b) and is headed by a judge of the county or district court. An appeal can also be made as to sentence, which includes an order as to costs. Refer to s. 92(1)(e).

Under subsection (2)(a), if the Part III trial is presided over by a justice of the peace, the appeal is to be to the provincial court (criminal division).

Under subsection (2)(b), if the Part III trial is presided over by a provincial judge, the appeal will be to the county or district court.

**94.** A defendant who appeals shall, if he is in custody, remain in custody, but a judge may order his release upon any of the conditions set out in subsection 2 of section 134.

This section is derived from Code s. 752.

**95.**—(1) A notice of appeal by a defendant shall not be accepted for filing if the defendant has not paid in full the fine imposed by the decision appealed from.

(2) A judge may waive compliance with subsection 1 and order that the appellant enter into a recognizance to appear on the appeal, and the recognizance shall be in such amount, with or without sureties, as the judge directs.

Under subsection (1), the defendant must pay his fine in full before a notice of appeal will be accepted; the reason for this is that appeal provisions have been abused in the past.



Subsection (2) permits waiver of this requirement in appropriate cases.

**96.** The filing of a notice of appeal does not stay the conviction unless a judge so orders.

This section ensures that in normal cases, the conviction and its consequences are not disturbed by the filing of a notice of appeal.

**97.**—(1) Where an appellant is in custody pending the hearing of the appeal and the hearing of the appeal has not commenced within thirty days from the day on which notice of the appeal was given, the person having custody of the appellant shall apply to a judge to fix a date for the hearing of the appeal.

(2) Upon receiving an application under subsection 1, the judge shall, after giving the prosecutor a reasonable opportunity to be heard, fix a date for the hearing of the appeal and give such directions as he thinks appropriate for expediting the hearing of the appeal.

This section is derived from Code s. 752.3.

**98.** A person does not waive his right of appeal by reason only that he pays the fine or complies with any order imposed upon conviction.

This section is derived from Code s. 753(1).

**99.** Where a notice of appeal has been filed, the clerk of the appeal court shall notify the clerk of the provincial offences court appealed from of the appeal and, upon receipt of the notification, the clerk of the provincial offences court shall transmit the order appealed from and transmit or transfer custody of all other material in his possession or control relevant to the proceedings to the clerk of the appeal court to be kept with the records of the appeal court.



This section is derived from Code:s.754(1).

100.—(1) The court may, where it considers it to be in the interests of justice,

- (a) order the production of any writing, exhibit or other thing relevant to the appeal;
- (b) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial.
  - (i) to attend and be examined before the court, or
  - (ii) to be examined in the manner provided by the rules before a judge of the court, or before any officer of the court or justice of the peace or other person appointed by the court for the purpose;
- (c) admit, as evidence, an examination that is taken under subclause ii of clause b;
- (d) receive the evidence, if tendered, of any witness;
- (e) order that any question arising on the appeal that,
  - (i) involves prolonged examination of writings or accounts, or scientific investigation, and
  - (ii) cannot in the opinion of the court conveniently be inquired into before the court, be referred for inquiry and report, in the manner provided by the rules, to a special commissioner appointed by the court; and
- (f) act upon the report of a commissioner who is appointed under clause e in so far as the court thinks fit to do so.

(2) In proceedings under this section, the parties or their counsel are entitled to examine or cross-examine witnesses

and, in an inquiry under clause e of subsection 1, are entitled to be present during the inquiry and to adduce evidence and to be heard.



This section is derived from Code s. 610.

Subsection (1)(a) :

Where the trial judge incorrectly refused to admit a document into evidence, it was accepted upon appeal by the appellate Court and considered in allowing the appeal and entering a verdict of acquittal. R. v. PARTRIDGE (1973), 15 C.C.C. (2d) 434, 5 Nfld. & P.E.I.R. 420 (P.E.I.S.C.).

Subsection (1)(b) :

Approval was given to an appellate Court receiving viva voce evidence of analysts whose certificates had been admitted as evidence at trial. KISSICK et al v. THE KING (1952), 102 C.C.C. 129, 14 C.R.1 (4:1) (S.C.C.)

Subsection (1)(d) :

If the fresh evidence is considered to be of sufficient strength that it might reasonably affect the verdict of the jury it should not be excluded on the grounds of an earlier failure to exercise reasonable diligence to present it at trial. MCMARTIN v. THE QUEEN, [1965] 1 C.C.C. 142, 43 C.R. 403 (9:0) (S.C.C.).

Before receiving the proposed new evidence, the appellate Court must first be satisfied that it is of sufficient cogency to warrant the granting of a new trial. R. v. YOUNG and three others, [1970] 5 C.C.C. 142, 11 C.R.N.S. 104 (N.S.S.C. App. Div.)

The power of an appellate Court to admit new evidence is broad and where this evidence, clearly relevant to the issue of guilt, was known to the accused but unknown to his counsel at trial, then considering the young accused's inexperience and unfamiliarity of the finality of the trial process it should be admitted. R. v. TAYLOR (1975), 22 C.C.C. (2d) 321, 1975 3 W.W.R. 485 (Alta. S.C. App. Div.)



Even if the fresh evidence would have had the effect of nullifying other evidence it will not be admitted if the result of its reception when weighed against the entire evidence might not have reasonably affected the jury's verdict.

R. v. DEMETER (1975), 25 C.C.C. (2d) 417 at p. 461, 10 O.R. (2d) 321 at p. 365 (5:0) (Ont. C.A.)

The Court of Appeal's power under this section is limited to admitting as fresh evidence admissible evidence only and manifestly does not authorize a Court of Appeal to dispense with the law of hearsay evidence. R. v. O'BRIEN (1977), 35 C.C.C. (2d) 209, 76 D.L.R. (3d) 513 (9:0) (S.C.C.)

**101.**—(1) An appellant may appear and act personally <sup>Right to counsel</sup> or by counsel.

(2) An appellant who is in custody as a result of the <sup>Attendance while in custody</sup> decision appealed from is entitled to be present at the hearing <sup>of the appeal.</sup>

(3) The power of a court to impose sentence may be <sup>Sentencing in absence</sup> exercised notwithstanding that the appellant is not present.

Subsection (1) clarifies the right of an appellant to act by counsel, which in the event of an appeal to the provincial court (criminal division) is defined by section 92 to include an agent. By virtue of section 82, a defendant who is a respondent in an appeal may likewise act by counsel or agent.

Subsection (2) narrows the breadth of the corresponding Code provision (s. 615).

**102.** An appellant may present his case on appeal and his argument in writing instead of orally, and the court shall consider any case or argument so presented.

This section is derived from Code s. 615(3).

**103.**—(1) On the hearing of an appeal against a conviction or against a finding as to the ability, because of mental disorder, to conduct a defence, the court by order,



(a) may allow the appeal where it is of the opinion that,

- - (i) the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.
  - (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
  - (iii) on any ground, there was a miscarriage of justice; or

(b) may dismiss the appeal where,

- (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of an information, was properly convicted on another count or part of the information.
- (ii) the appeal is not decided in favour of the appellant on any ground mentioned in clause a, or
- (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subclause ii of clause a the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred.

(2) Where the court allows an appeal under clause a of subsection 1, it shall,

(a) where the appeal is from a conviction.

- (i) direct a finding of acquittal to be entered, or
- (ii) order a new trial; or

(b) where the appeal is from a finding as to the ability, because of mental disorder, to conduct a defence, order a new trial, subject to section 45.

(3) Where the court dismisses an appeal under clause b of subsection 1, it may substitute the decision that in its opinion should have been made and affirm the sentence passed by the trial court or impose a sentence that is warranted in law.



This section is derived from Code s. 613(1,2,3).

Subsec. (1) (a) (i). The phrase "unreasonable or cannot be supported by the evidence" allows an appellate Court to exercise its independent judgment to decide whether the evidence was of such a kind, description or character that it would be unsafe to rest a conviction upon it: *R. v. RUSNAK*, [1963] 1 C.C.C.143 (B.C.C.A.).

Where the jury was mistaken in that its deductions from the evidence were illogical or there was a clear error in its appreciation of the evidence there can be no foundation for a verdict of guilty: *R. v. SANGHI* (1971), 6 C.C.C. (2d) 123, 3 N.S.R. (2d) 70 (N.S.S.C.App.Div.).

In the first majority reasons for judgment in *R. v. CAOUETTE* (1972), 9 C.C.C. (2d) 449, 32 D.L.R. (3d) 185 (S.C.C.) it was held *per* Fauteux C.J.C. (Abbott, Judson and Pigeon, JJ., concurring), that if an appellate court is of the opinion that there was an absence or insufficiency of evidence it cannot set aside the jury's conviction before considering whether the evidence permitted the jury to find the accused guilty.

A useful review of the inception of and authorities on subpara. (i) will be found in the reasons for judgment of Branca, J.A., in *R. v. DHILLON* (1972), 9 C.C.C. (2d) 414, [1973] 1 W.W.R.510 (B.C.C.A.).

The function of an appellate Court on its review of evidence as to whether or not a verdict was unreasonable was the subject of two opinions in *CORBETT v. THE QUEEN* (1973). 14 C.C.C. (2d) 385, 25 C.R.N.S. 296 (S.C.C.). The majority (5:2) held that on this issue the question was not whether the verdict was unjustified, but whether the weight of the evidence was so weak that the verdict of guilty was unreasonable because no reasonable jury acting judicially could have reached it. The minority view was that an appellate Court on this issue had a duty to weigh the evidence to bring its own judgment to bear on the issue as to whether the jury's verdict was unreasonable or could not be supported by the evidence and was quite entitled to substitute its opinion for that of the jury on that issue.

Subsec. (1) (b) (iii). The onus is upon the Crown to satisfy the appellate court that the verdict would necessarily have been the same if the error

had not occurred. Even so the appellate court may still choose to allow the appeal if there was any possibility that the jury, properly charged, would have had a reasonable doubt: *COLPITTS v. THE QUEEN*, [1966] 1 C.C.C. 146, 47 C.R. 175 (S.C.C.) (4:3).

In deciding whether to invoke this paragraph the appellate Court may consider the fact that the accused did not testify in the face of inculpatory facts: *AV'ON v. THE QUEEN* (1971), 4 C.C.C. (2d) 357, 21 D.L.R. (3d) 442 (S.C.C.) (5:2).

In *R. v. MILLER and COCKRIEIL* (1973), 24 C.C.C. (2d) 401 at p. 457, 33 C.R.N.S. 129 at p. 185 (5:0) (B.C.C.A.), afid 31 C.C.C. (2d) 177, [1977] 2 S.C.R. 680, 70 D.L.R. (3d) 324 (9:0), Robertson, J.A., after considering *COLPITTS v. THE QUEEN*, *supra*, stated that when asked to apply this provision the Court must consider three questions, each predicated upon the assumption that there had been no misdirection, as follows: "Would the verdicts have necessarily been the same? Could the jury, as reasonable men, have done otherwise than find the appellants guilty? Is there any possibility that they would have had a reasonable doubt as to the guilt of the accused?"



*Subsec. (2).* Where a mistrial was found and there was nothing to be gained by ordering a new trial the appellate Court simply set the conviction aside: *R. v. GRANT* (1975), 23 C.C.C. (2d) 317, [1975] W.W.D. 82 (B.C.C.A.).

Where it cannot be said that there was no evidence to go to the jury the proper disposition is to order a new trial: *R. v. WOODWARD* (1975), 23 C.C.C. (2d) 508 (Ont. C.A.).

Service of a portion of an intermittent gaol term prior to a successful appeal is a factor making it appropriate to order that an acquittal be entered: *R. v. DILLABOUGH* (1975), 23 C.C.C. (2d) 482 (Ont. C.A.).

*Subsec. (3).* An appellate court dismissing an appeal pursuant to subsec. (1) (b) (i) has the power to amend the conviction to conform with the evidence: *LAKE v. THE QUEEN*, [1969] 2 C.C.C. 224, 1 D.L.R. (3d) 322 (S.C.C.).

Where the municipal *situs* of the crime was proven to be a municipality other than the one set out in the indictment the appellate Court does not possess the power to amend the indictment to conform with the evidence and, accordingly, a verdict of acquittal must be entered: *R. v. PEARSON* (1972), 6 C.C.C. (2d) 17, 17 C.R.N.S.1 (2:1) (Que.C.A.).

The power of substitution applies to an appeal where the legally defective conviction was for an offence which included a lesser offence for which a conviction would have been proper: *R. v. MORRIS* (1975), 29 C.C.C. (2d) 540, 12 N.B.R. (2d) 568 (S.C. App. Div.).

**104.** Where an appeal is from an acquittal, the court may by order,

- (a) dismiss the appeal; or
- (b) allow the appeal, set aside the finding and,
  - (i) order a new trial, or
  - (ii) enter a finding of guilt with respect to the offence of which, in its opinion, the appellant should have been found guilty, and pass a sentence that is warranted in law.



This section is derived from Code s. 613(4).

*Subsec. (4).* Since the imposition of sentence is a duty under this subsection primarily placed upon the appeal court it should do so after the accused has had an opportunity to make his submissions: *LOWRY and LEPPER v. THE QUEEN* (1972), 6 C.C.C. (2d) 531, 26 D.L.R. (3d) 224 (S.C.C.).

It is the duty of the Crown in order to obtain a new trial to satisfy the appellate Court that the verdict would not necessarily have been the same if the trial Judge had properly directed the jury: *VEZEAU v. THE QUEEN* (1976), 28 C.C.C. (2d) 81, 8 N.R. 235 (S.C.C.) (9:0).

Once an appellate Court has concluded that the trial Judge erred in law, the Crown appellant, before a new trial will be ordered, must discharge the onus of satisfying the appellate Court that had the trial Judge properly instructed himself, his judgment of acquittal would not necessarily have been the same: *R. v. ANTHES BUSINESS FORMS LTD.* (1975), 26 C.C.C. (2d) 349, 10 O.R. (2d) 153 (C.A.).

**105.** - (1). Where an appeal is taken against sentence, the court shall consider the fitness of the sentence appealed from and may, upon such evidence, if any, as it thinks fit to require or receive, by order,

(a) dismiss the appeal; or

(b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted.

and, in making any order under clause b, the court may take into account any time spent in custody by the defendant as a result of the offence.

(2) A judgment of a court that varies a sentence has the same force and effect as if it were a sentence passed by the trial court.

This section is derived from Code s. 614.

*Subsec. (1).* The clause "vary the sentence within the limits prescribed by law" plainly fixes the scope of the power of an appellate Court by reference to the maximum prescribed penalty irrespective of the penalty imposed at trial, and accordingly where the Crown has given reasonable notice in its factum an appellate Court may increase the sentence on the accused's sentence appeal. Furthermore on any appeal against sentence an appellate Court has jurisdiction to vary either way as it deems proper: *HILL v. THE QUEEN* (No. 2) (1975), 25 C.C.C. (2d) 6, 62 D.L.R. (3d) 193 (S.C.C.) (5:4).



*Principles*

The Crown upon appeal against a sentence as inadequate cannot repudiate its position taken before sentence at trial: *R. v. AGOZZINO*, [1970] 1 C.C.C. 380, 6 C.R.N.S. 147 (Ont. C.A.). *Contra, R. v. WOOD* (1975), 26 C.C.C. (2d) 100, [1976] 2 W.W.R. 135 (Alta. S.C. App. Div.).

To permit the Crown to repudiate its position at trial is destructive of the orderly administration of justice and the Crown will therefore only be permitted to do so where it can be shown that the public interest in the orderly administration of justice is outweighed by the gravity of the offence and the gross insufficiency of the sentence: *R. v. MacARTHUR* (1978), 39 C.C.C. (2d) 158, 15 C.R. (3d) S-4 (P.E.I.S.C. App. Div.).

The imposition of an excessively lenient sentence on one co-accused by one trial Court will not bind the other trial Court to make the same error in principle against the second co-accused: *R. v. HUNTER* (1970), 16 C.R.N.S. 12 (Ont. C.A.).

It is an error in principle to impose a gaol term instead of a fine for an offence because the defendant is a man of means, for to do so is to discriminate against an economic class rather than dispensing equal treatment before the law: *R. v. JOHNSON* (1971), 5 C.C.C. (2d) 541, 17 C.R.N.S. 329 (N.S.S.C.App.Div.).

An appellate Court should not lightly disregard the sentencing Judge's judgment, but may alter the sentence if it was wrong or if he improperly

exercised his discretion, or committed an error or irregularity, or violated a principle, or imposed a sentence not within statutory limits: *R. v. SPRAGUE, GOTTSelig, HERI'Y, CARR, TURNER and McDONALD* (1974), 19 C.C.C. (2d) 513, [1975] 1 W.W.R. 22 (4:1) (Alta. S.C.App.Div.).

A useful review of the modern authorities on the principles of sentencing is found in *R. v. MELLSTROM* (1975), 22 C.C.C. (2d) 472, 29 C.R.N.S. 327 (Alta. S.C. App. Div.) where it was also held that the sentence should be within the range of those contemporaneously imposed for similar offences and that the enormity of the tragic consequences of an offence should not be allowed to unduly distort the consideration of the Court as to the appropriate penalty.

It is an error for a trial Court to follow a self-imposed standard penalty without giving consideration to the individual accused: *R. v. WEBB* (1975), 28 C.C.C. (2d) 456, 9 Nfld. & P.E.I.R. 136 (P.E.I.S.C.).

A factor in mitigation of sentence is the plea of guilty which saves the community the expense of a trial: *R. v. JOHNSTON and TREMAYNE*, [1970] 4 C.C.C. 64, [1970] 2 O.R. 780 (C.A.).

In our changing society the Courts should continue to review and reappraise the elements of and their emphasis upon sentence, the current view being that the factors are (1) punishment; (2) deterrence; (3) protection of the public; and (4) the reformation and rehabilitation of the offender. Furthermore, with changing conditions less emphasis should be placed upon the trial Judge's advantage in seeing and hearing the accused and an appellate Court should not hesitate to disagree with his reasons and conclusions if it feels that the sentence was not fit: *R. v. MORRISSETTE and two others* (1970), 1 C.C.C. (2d) 307, 12 C.R.N.S. 392 (Sask. C.A.).



**106.** Where one sentence is passed upon a finding of guilt on two or more counts, the sentence is good if any of the counts would have justified the sentence.

This section is derived from Code s. 596.

Although the imposition of a single sentence for two offences is permitted by this section it is preferable that one sentence be imposed for each conviction, and the sentences may, of course, be made concurrent: *R. v. THORPE* (1976), 32 C.C.C. (2d) 46 (Man. C.A.).

**107.**—(1) Judgment shall not be given in favour of an appellant based on any alleged defect in the substance or form of an information, certificate or process or any variance between the information, certificate or process and the evidence adduced at trial unless it is shown that objection was taken at the trial and that, in the case of a variance, an adjournment of the trial was refused notwithstanding that the variance had misled the appellant.

(2) Where an appeal is based on a defect in a conviction or an order, judgment shall not be given in favour of the appellant, but the court shall make an order curing the defect.

This section is derived from Code s. 755(7).

*Subsec. (7).* Where a charge omits or makes a defective statement of an essential element, but contains in substance a statement that the defendant committed the offence an appellate Court may, if the absence of the correct averment did not cause any substantial wrong or miscarriage of justice, amend the information and affirm the conviction: *R. v. MAJOR* (1975), 25 C.C.C. (2d) 62, 10 N.S.R. (2d) 348 (S.C. App. Div.), revd on other grounds (1976), 27 C.C.C. (2d) 239n, 14 N.S.R. (2d) 705n (S.C.C.) (9:0). In any event inclusion of the offence section

number will provide a reasonable description of the transaction alleged: *R. v. COTE* (1977), 33 C.C.C. (2d) 353, 73 D.L.R. (3d) 752 (6:2) (S.C.C.). This case would also appear to be authority for the proposition that if no objection is taken to a defect apparent on the face under s. 732 this subsection is a bar to raising the matter on appeal.



An information that it is duplicitous or multifarious contains a defect apparent on its face and must be raised at trial pursuant to s. 782. Where no objection is taken at trial this subsection prevents the raising of the matter on appeal. Nor may the objection be raised on a further appeal to the Court of Appeal under s. 771 (a) : *R. v. CITY OF SAULT STE. MARIE* (1976), 30 C.C.C. (2d) 257, 70 D.L.R. (3d) 430 (Ont. C.A.). On further appeal (1978), 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299 (9:0) the Court found that the information was not duplicitous and therefore did not find it necessary to deal with this issue.

**108.** Where a court exercises any of the powers conferred by sections 100 to 107, it may make any order, in addition, that justice requires.

This section is derived from Code s. 613(8).

**109.—(1)** Where a court orders a new trial, it shall be held in a provincial offences court presided over by a justice other than the justice who tried the defendant in the first instance unless the appeal court directs that the new trial be held before the justice who tried the defendant in the first instance.

(2) Where a court orders a new trial, it may make such order for the release or detention of the appellant pending such trial as may be made by a justice under subsection 2 of section 134 and the order may be enforced in the same manner as if it had been made by a justice under that subsection.

Subsection (1) is derived from Code s. 755(2) and permits the court to order that the new trial be heard by the justice who heard the first trial.

Subsection (2) is derived from Code s. 755(3).

**110.—(1)** Where, because of the condition of the record of the trial in the trial court or for any other reason, the court, upon application of the appellant or respondent, is of the opinion that the interests of justice would be better served by hearing and determining the appeal by holding a new trial in the court, the court may order that the appeal



shall be heard by way of a new trial in the court in accordance with the rules, and for this purpose this Act applies, with necessary modifications, in the same manner as to a proceeding in a provincial offences court.

(2) The court may, for the purpose of hearing and determining an appeal under subsection 1, permit the evidence of any witness taken before the trial court to be read if that evidence has been authenticated and if,

(a) the appellant and respondent consent;

(b) the court is satisfied that the attendance of the witness cannot reasonably be obtained; or

(c) by reason of the formal nature of the evidence or otherwise the court is satisfied that the opposite party will not be prejudiced,

and any evidence that is read under the authority of this subsection has the same force and effect as if the witness had given the evidence before the court.

This section is derived from Code s. 755(4) and (5).

Subsec. (4). The words "or for any other reason" should be given a restrictive interpretation and the trial *de novo* procedure should be resorted to only where there was a denial of natural justice in the summary conviction Court or a deficiency in the transcript of the trial. In particular a trial *de novo* should not be ordered solely because the accused, having elected to call no evidence in the summary conviction Court, wishes to present a defence on appeal. Nor should the Court allow such evidence to be called on the appeal under the power to hear fresh evidence pursuant to s. 610 of the Criminal Code made applicable to summary conviction appeals by subsec. (1): *R. v. FAULKNER* (1977), 37 C.C.C. (2d) 26, 39 C.R.N.S. 331 (N.S. Co. Ct.).



For a judicial interpretation of the Code provisions,  
see the judgment of Re Koternics and Koternics (1978),  
20 O.R. (2d) 548. The headnote is set out below:

Under the Rules of Court for Summary Conviction Appeals formulated and approved by the County and District Judges Association, a County Court Judge has the following options. Where the transcript is complete and intelligible and there are no procedural irregularities or improper exclusion of evidence, it is appropriate to base the appeal upon a transcript of the Provincial Court trial. Where there is some point of importance on which evidence has not been led or possibly where relevant events occurred subsequent to trial, the transcript can be supplemented by *vera voce* evidence. Where the transcript is incomplete or partly illegible or if there have been irregularities of procedure or rulings on evidence likely to interfere with a fair trial, the case should be remitted to the Provincial Court for a new trial before the accused should be obliged to appeal to a higher Court. As an accused person is entitled to a fair trial in the Provincial Court before he is obliged to appeal to a higher one, there is ordinarily no reason why a trial *de novo* should be held. Moreover, the first step in a summary conviction appeal under the new Rules should be a motion to decide what course of action the County Court Judge is going to select.

Accordingly, in a case where the accused deposes that because he was not represented by counsel and because of his inability to understand the English language he did not receive a fair trial, the appropriate course is to remit the case to the Provincial Court for a new trial.

<sup>Dismissal or  
abandonment</sup> 111. The court may, upon proof that notice of an appeal has been given and that,

- (a) the appellant has failed to comply with any order made under section 94 or 95 or with the conditions of any recognizance entered into under either of those sections; or
- (b) the appeal has not been proceeded with or has been abandoned,

order that the appeal be dismissed.

This section is derived from Code section 756.  
--



**Costs**

**112.** -(1) Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the court may make any order with respect to costs that it considers just and reasonable.

**Payment**

(2) Where the court orders the appellant or respondent to pay costs, the order shall direct that the costs be paid to the clerk of the trial court, to be paid by him to the person entitled to them, and shall fix the period within which the costs shall be paid.

**Enforce-  
ment**

(3) Costs ordered to be paid under this section by a person other than a prosecutor acting on behalf of the Crown shall be deemed to be a fine for the purpose of enforcing its payment.

Subsection (1) is derived from Code s. 758. Note that costs are not as limited as in the analogous provision in section 121.

It was held in *R. v. MASURAK* (1962), 132 C.C.C.279, 37 C.R.5 (Sask.C.A.) that the making of an order for costs of appeal is within the discretion of the judge. His failing to do so does not raise a question of law upon which to base an appeal to the Court of Appeal.

Subsection (2) and (3) are derived from Code s. 759 and s. 760.

**113.** An order or judgment of the appeal court shall be implemented or enforced by the trial court and the clerk of the appeal court shall send to the clerk of the trial court the order and all writings relating thereto.

This provision ensures the uniform administrative implementation and enforcement of all orders in the same manner as if made by the trial court, and avoids the duplication of administrative machinery.



114.—(1) A defendant or the prosecutor or the Attorney General by way of intervention may appeal from the judgment of the court to the Court of Appeal, with leave of a justice of appeal on special grounds, upon any question of law alone or as to sentence in accordance with the rules made under section 123.

(2) No leave to appeal shall be granted under subsection 1 <sup>Grounds for leave</sup> unless the justice of appeal considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted.

This section may be compared with the special leave to appeal provisions in section 37 of The Juvenile Delinquents Act, R.S.C. c. 160. Subsection (1) allows an appeal from sentence.

115. A defendant who appeals shall, if he is in custody, remain in custody, but a judge may order his release upon <sup>Custody pending appeal</sup> any of the conditions set out in subsection 2 of section 134.

This section is derived from Code s. 752. Please note that release pending appeal to the Court of Appeal is dealt with by a justice of appeal.

116. Where an application for leave to appeal is made, the Registrar of the Court of Appeal shall notify the clerk <sup>Transfer of record</sup> of the court appealed from of the application and, upon receipt of the notification, the clerk of the court shall transmit to the Registrar all the material forming the record including any other relevant material requested by a justice of appeal.

This section is derived from Code s. 609.

117. Sections 98, 100, 101, 102, 103, 104, 105, 106, 107, 108 and 109, clause b of section 111 and section 112 apply, <sup>Application of ss 98, 100-109, 111(b), 112</sup> with necessary modifications, to appeals to the Court of Appeal under section 114.



These provisions are derived from the procedure recently enacted for summary conviction appeals under the Criminal Code. It was felt that the line between the serious provincial offences and the minor criminal offences is not so great as to require a different appeal procedure for the latter. In this instance, the benefits accruing from uniformity are felt to greatly exceed any disadvantages.

The only principal difference from the Code is the abolition of the stated appeal case. The derivation of the sections is as follows:

s. 98 (Code s. 752.3); s. 100 (Code s. 610); s. 101 (Code s. 615); s. 102 (Code s. 615(3)); s. 103 (Code s. 613(1, 2, 3)); s. 104 (Code s. 613(4)); s. 105 (Code s. 614); s. 106 (Code s. 596); s. 107 (Code s. 755(7)); s. 108 (Code s. 613(8)); s. 109 (Code s. 755(2) and (3)); clause b of s. 111 (Code s. 756); s. 112 (Code s. 758, s. 759 and s. 760).

#### Appeals under Part I and Part II

##### APPEALS UNDER PARTS I AND II

**118.—(1)** A defendant or the prosecutor or the Attorney General by way of intervention is entitled to appeal an acquittal, conviction or sentence in a proceeding commenced by certificate under Part I or II and the appeal shall be to the provincial court (criminal division) of the county or district in which the adjudication was made.

(2) A notice of appeal shall be in the prescribed form and <sup>Application for appeal</sup> shall state the reasons why the appeal is taken and shall be filed with the clerk of the provincial court (criminal division) within fifteen days after the making of the decision appealed from, in accordance with the rules.

Notice of hearing

(3) The clerk shall, as soon as is practicable, give a notice to the defendant and prosecutor of the time and place of the hearing of the appeal.



Under subsection (1), all appeals from a Part I or II proceeding shall be to the provincial court (criminal division).

Under subsection (2), the application for appeal shall state the reasons for the appeal. The deadline is fifteen days after the original decision.

*Conduct of appeal*

119.—(1) Upon an appeal, the court shall give the parties an opportunity to be heard for the purpose of determining the issues and may, where the circumstances warrant it, make such inquiries as are necessary to ensure that the issues are fully and effectively defined.

*Review*

(2) An appeal shall be conducted by means of a review in the provincial court (criminal division) of the county or district in which the adjudication was made.

*Evidence*

(3) In determining a review, the court may,

- (a) hear or rehear the recorded evidence or any part thereof and may require any party to provide a transcript of the evidence, or any part thereof, or to produce any further exhibit;
- (b) receive the evidence of any witness whether or not the witness gave evidence at the trial;
- (c) require the justice presiding at the trial to report in writing on any matter specified in the request; or
- (d) receive and act upon statements of agreed facts or admissions.

Under this section, the provincial court (criminal division) shall conduct the appeal as a review. As a result of the review, the court may order a new trial under section 121, but the review is not, in itself, a new trial.

Under subsection (1), the judge shall first of all define the issues.

Under subsection (3), the court is given wide powers in



determining its review.

~~Dismissal  
on abandon-  
ment~~ 120. Where an appeal has not been proceeded with or abandoned, the court may order that the appeal be dismissed.

This section is self-explanatory.

~~Powers of  
court on  
appeal~~ 121.—(1) Upon an appeal, the court may affirm, reverse or vary the decision appealed from or where, in the opinion of the court, it is necessary to do so to satisfy the ends of justice, direct a new trial.

: New trial (2) Where the court directs a new trial, it shall be held in the provincial offences court presided over by a justice other than the justice who tried the defendant in the first instance, but the appeal court may, with the consent of the parties to the appeal, direct that the new trial be held before the justice who tried the defendant in the first instance or before the judge who directs the new trial.

(3) Upon an appeal, the court may make an order under ~~Costs~~ section 61 for the payment of costs incurred on the appeal, and subsection 3 thereof applies to the order in the same manner as to an order of a provincial offences court.

Subsection (1) reflects the decision to separate the appellate review provisions from the new trial provisions.

Subsection (2) adds the presumption that the new trial would not generally be held before the judicial officer who conducted the first trial.

Subsection (3) allows costs to be ordered. The order for costs is substantially limited by section 61, unlike costs under section 112.



122.—(1) An appeal lies from the judgment of the provincial court (criminal division) to the Court of Appeal, with leave of a justice of appeal, on special grounds, upon any question of law alone in accordance with the rules made under section 123.

(2) No leave to appeal shall be granted under subsection 1 <sup>Appeal to  
Court of  
Appeal</sup> <sub>Grounds for leave</sub> unless the justice of appeal considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted.

(3) Upon an appeal under this section, the Court of Appeal <sup>Costs</sup> may make any order with respect to costs that it considers just and reasonable.

Subsection (1) allows for restricted appeals to the Court of Appeal on questions of law alone. The special grounds must be found to exist by the justice of appeal hearing the motion for leave. There is no appeal as to sentence under this provision.

In subsection (2), the meaning of "public interest or due administration of justice," has been discussed as follows:

In my opinion, in the determination of what may constitute the public interest Parliament intended to give to the Judge a wide and unfettered discretion. To attempt to define with particularity what constitutes public interest would not only be difficult but would likely result in restricting by judicial pronouncement the unfettered discretion which Parliament intended to confer. The proper application, in my view, is to give to public interest a comprehensive meaning and to decide in the circumstances of each case whether or not the public interest requires the prisoner's detention.

I am convinced that the effective enforcement and administration of the criminal law can only be achieved if the Courts, Judges and police officers, and law enforcement agencies have and maintain the confidence and respect of the public. Any action by the Courts, Judges, police officers, or law enforcement agencies which may detrimentally affect that public confidence and respect would be contrary to the public interest.



Under subsection (3), costs may be ordered.

Rules for Appeals

RULES FOR APPEALS

123. The Lieutenant Governor in Council may make rules of court not inconsistent with this or any other Act for the conduct of and governing practices and procedures on appeals in the provincial courts (criminal division), the county and district courts and the Court of Appeal under this Act, and respecting any matter arising from or incidental to such appeals.

Under this section, the Lieutenant-Governor-in-Council may make rules governing procedure on appeals in the provincial court (criminal division), county and district court, and the Court of Appeal.

Review

124.—(1) Upon an application by way of originating notice, the High Court may by order grant any relief in respect of matters arising under this Act that the applicant would be entitled to in proceedings by way of an application for an order in the nature of mandamus, prohibition or *certiorari*.

(2) Notice of an application under this section shall be served on,

(a) the person whose act or omission gives rise to the application;

(b) any person who is a party to a proceeding that gives rise to the application; and

(c) the Attorney General.

Appeal— (3) An appeal lies to the Court of Appeal from an order made under this section.



These provisions clear up the judicially-noted confusion in the availability of extraordinary remedies in provincial offence proceedings. In addition, by combining certain of the provisions of Part XXIII of the Criminal Code with those of The Judicial Review Procedure Act, 1971, these provisions provide a clear and sensible approach to extraordinary remedies.

Notice re  
*certiorari*

125.—(1) A notice under section 124 in respect of an application for relief in the nature of *certiorari* shall be given at least seven days and not more than ten days before the date fixed for the hearing of the application and the notice shall be served within thirty days after the occurrence of the act sought to be quashed.

Filing  
material

(2) Where a notice referred to in subsection 1 is served on the person making the decision, order or warrant or holding the proceeding giving rise to the application, such person shall forthwith file in the High Court for use on the application, all material concerning the subject-matter of the application.

Where  
appeal  
available

(3) No application shall be made to quash a conviction, order or ruling from which an appeal is provided by this Act, whether subject to leave or otherwise.

Substantial  
wrong

(4) On an application for relief in the nature of *certiorari*, the High Court shall not grant relief unless the court finds that a substantial wrong or miscarriage of justice has occurred, and the court may amend or validate any decision already made, with effect from such time and on such terms as the court considers proper.

Order for  
immunity  
from civil  
liability

(5) Where an application is made to quash a decision, order, warrant or proceeding made or held by a justice on the ground that he exceeded his jurisdiction, the High Court may, in quashing the decision, order, warrant or proceeding, order that no civil proceeding shall be taken against the justice or against any officer who acted under the decision, order or warrant or in the proceeding or under any warrant issued to enforce it.



Under subsection (3), the availability of a remedy in the nature of certiorari to quash a decision is restricted to matters from which there is no appeal; this keeps most challenges to decisions in the appellate review stream.

In subsection (4), "substantial wrong or miscarriage of justice" has been discussed as follows:

What will constitute a miscarriage of justice may vary, not only in regard to the jurisdiction which has been invoked by the court in question; and to reach the conclusion that a miscarriage of justice has taken place does not require a finding that a different result would have been reached in the proceedings said to be affected by the miscarriage. It is enough if what is done is not justice according to law.

Wilson v. Wilson, 1969 A.L.R. 191 (C.A.), per Asprey J., at p. 200.

Application  
for habeas  
corpus

126.--(1) Upon an application by way of originating notice, the High Court may by order grant any relief in respect of a matter arising under this Act that the applicant would be entitled to in proceedings by way of an application for an order in the nature of *habeas corpus*.

Procedure on  
application  
for relief  
in nature of  
habeas corpus

--

(2) Notice of an application under subsection 1 for relief in the nature of *habeas corpus* shall be served upon the person having custody of the person in respect of whom the application is made and upon the Attorney General and upon the hearing of the application the presence before the High Court of the person in respect of whom the application was made may be dispensed with by consent, in which event the High Court may proceed to dispose of the matter forthwith as the justice of the case requires.



(3) Subject to subsections 1 and 2, *The Habeas Corpus Act* Application of R.S.O. 1970. c. 197 applies to applications under this section, but an application for relief in the nature of *certiorari* may be brought in aid of an application under this section.

(4) *The Judicial Review Procedure Act, 1971* and sections 69 and 70 of *The Judicature Act* do not apply to matters in respect of which an application may be made under section 124. 1971. c. 48 and R.S.O. 1970. c. 228. as 69, 70 do not apply

(5) A court to which an application or appeal is made Costs under section 124 or this section may make any order with respect to costs that it considers just and reasonable.

The Habeas Corpus Act is not affected; the provisions here merely permit a party who wishes to use them to bring the application in a simpler, more expeditious manner. In addition, the more easily brought certiorari remedy of this Act may be joined with habeas corpus in lieu of the more procedurally-complex certiorari available under The Habeas Corpus Act.

### Other Appeal Provisions

#### Bail

**136.** A defendant or the prosecutor may appeal from an Appeal order or refusal to make an order under section 134 or 135 and the appeal shall be to the county or district court of the county or district in which the adjudication was made and shall be conducted in accordance with the rules made under section 123.

Section 136 replaces the bail review proceedings of the Code with an appeal. It permits an appeal to the county or district court in compliance with rules established under section 123. Section 135(2) allows for a review of a detention order at every appearance of the defendant in court.



Search Warrants

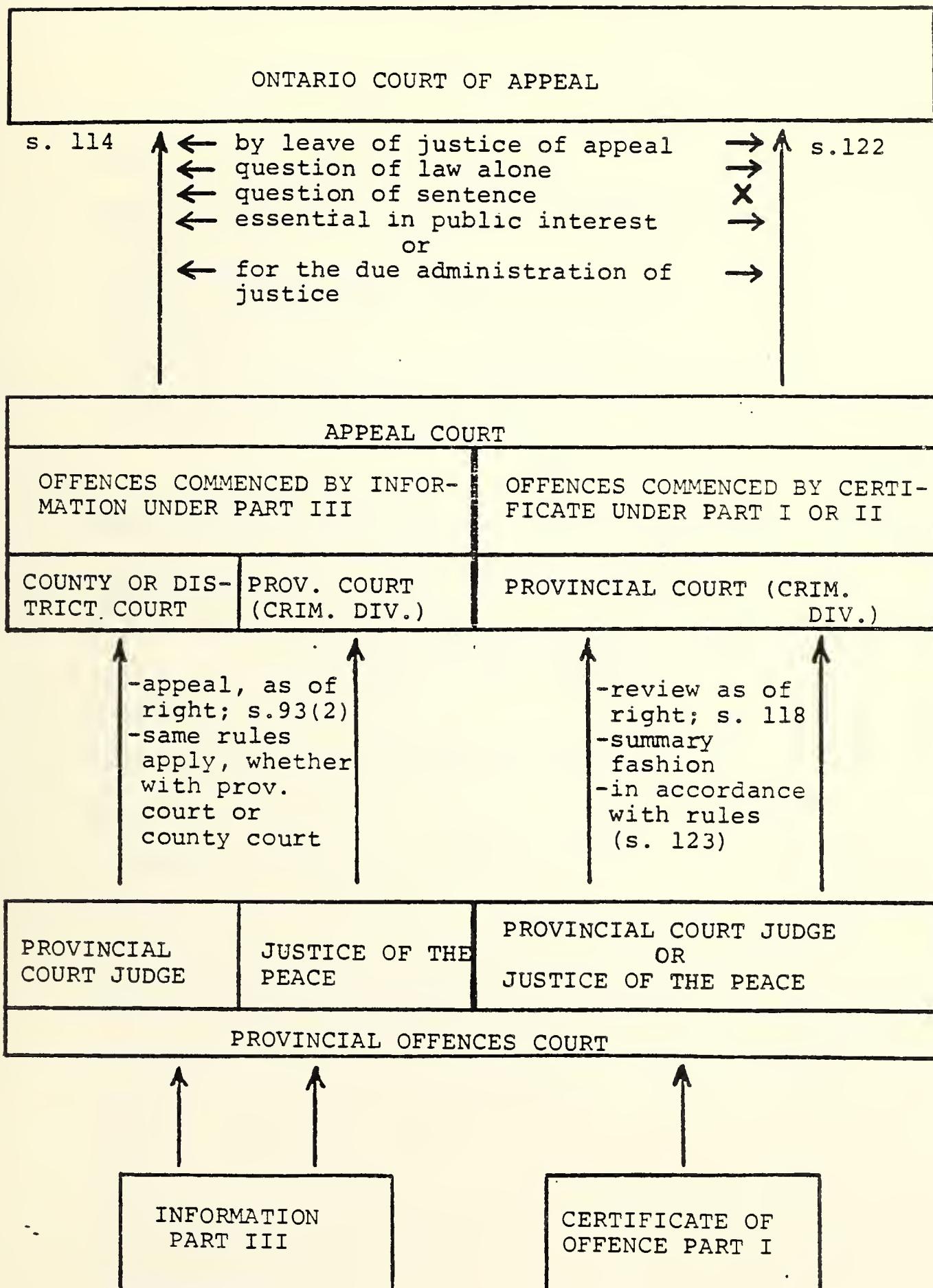
Section 143

(5) Where an order or refusal to make an order under subsection 3 or 4 is made by a justice of the peace, an appeal lies therefrom in the same manner as an appeal from a conviction in a proceeding commenced by means of a certificate.

If a justice makes or refuses to make an order for the examination, testing, inspection or reproduction of anything, or the release of anything detained under a search warrant, an appeal lies to the provincial court (criminal division).



APPEALS UNDER THE PROVINCIAL OFFENCES ACT, 1979





Index

NOTE: Numbers in right-hand column refer to pages of this manual.

	exercise of judicial discretion	133 - 137
	role of justices of the peace; territorial jurisdiction	2, 17 - 19, 61
	<u>The Provincial Courts Act</u>	
s.9(la)	residual power (where procedures not provided)	2
s. 16b	creation of Provincial Offences Court	1
s. 16d	contempt of court; appeal	3

The Provincial Offences Act

s.1(1)	definitions; provincial offences officer; prosecutor	7, 106
s. 3	certificate of offence; service, etc.	5 - 8
s. 4	filing of certificate in court office	8 - 9
s. 5	dispute with trial	11, 15, 100
s. 7	plea of guilty with representations	11 - 19, 24
s. 8	payment out of court	20
s. 9	failure to respond to offence notice	20 - 22
s.11	reopening on failure of notice	21, 23, 25
s.12	penalty	7,22, 25-27
s.13	regulations	27, 93
s.22	commencement of proceeding by information	63
s.23	summons before information laid	10,64,66
s.24	information	10,64-65
s.25	procedure on laying of information	10,35,65-66
s.26	counts; sufficiency, etc.	28, 66-69
s.27	summons; service, etc.	70 - 72
s.30	proper court; transfer, etc.	74 - 77, 98
s.31	- justice presiding at trial	77, 84, 105
s.32	retention of jurisdiction	77



s.34	dividing counts	87-88, 91
s.35	amendment of information or certificate	89 - 92
s.36	particulars	92 - 93
s.37	motion to quash information or certificate	94 - 95
s.38	costs on amendment or particulars	92 - 93, 98
s.39	joinder of counts or defendants; separate trials	87, 95
s.40	issuance of subpoena to witness	100 - 101
s.41	arrest of witness	35, 101 - 102
s.42	order for person in a prison to attend	102
s.43	penalty for failure to attend	102 - 103
s.44	order for evidence by commission	102-103, 135
s.45	trial of issue as to capacity to conduct defence (mental disorder)	78-86, 141
s.46	taking of plea; plea of guilty to another offence	16, 103, 110
s.47	trial on plea of not guilty; agreed facts	104 - 105
s.48	evidence taken on another charge	105 - 106
s.49	exhibits	106, 134
s.51	appearance by defendant; corporation; exclusion of agents	16, 107
s.52	compelling attendance of defendants	107
s.53	excluding defendant or public from hearing	107 - 108
s.54	failure of prosecutor to appear	108 - 109
s.55	<u>ex parte</u> conviction	109 - 110
s.56	included offences	104, 110-111
s.57	pre-sentence report	113
s.58	submissions as to sentence	113-114
s.59	time spent in custody considered	114-115
s.60	provision for minimum penalty; relief	115
s.61	fixed costs on conviction; costs respecting witnesses, etc.	98, 99, 109, 116, 159
s.62	general penalty; elimination of imprisonment	116
s.63	minute of conviction	117
s.64	time when imprisonment starts	117-118
s.65	sentences consecutive	118
s.66	authority of warrant of committal	118-119



s.67	when fine due; extension of time	119
s.68	regulation for work credits for fines	121
s.69	civil enforcement of fines	129
s.70	default; imprisonment on default	129
s.71	suspension of fine on conditions	121
s.72	probation order	122 - 124
s.74	variation of probation order	124 - 125
s.75	breach of probation order	125 - 126
s.76	limitation period; extension	8,57,63
s.82	counsel or agent	16,107, 145
s.86	penalty for false statement	13
s.87	delivery; presumption concerning mail	24
s.90	irregularities in form	96, 98
s.91	regulations (fixing costs, etc.)	99
s.92	interpretation (appeals)	139-140, 141, 145
s.93	appeal under Part III; appeal court	84, 140-141
s.94	custody pending appeal	141
s.95	payment of fine before appeal	141 - 142
s.96	stay of conviction	142
s.97	fixing of date where appellant in custody	142
s.98	payment of fine not waiver	142
s.99	transmittal of material	142
s.100	powers of court	143 - 145
s.101	right to counsel	145
s.102	written argument	145
s.103	powers on appeal against conviction	84, 145 - 148
s.104	powers on appeal against acquittal	148 - 149
s.105	appeal against sentence	149 - 150
s.106	one sentence on more than one count	151
s.107	appeal based on defect in information, etc.	151 - 152
s.108	additional orders	152
s.109	new trial	85, 152
s.110	trial <u>de novo</u>	152 - 154
s.111	dismissal or abandonment	154
s.112	costs	155,159



s.113	implementation of appeal court order	155
s.114	appeal to Court of Appeal	156
s.115	custody pending appeal	156
s.116	transfer of record	156
s.117	application to appeals to Court of Appeal	156
s.118	appeal under Parts I and II	157
s.119	conduct of appeal; review	158
s.120	dismissal on abandonment	159
s.121	powers of court on appeal	159
s.122	appeal to Court of Appeal	160
s.123	rules of court for appeals	161, 164
s.124	application for relief	161
s.125	notice re <u>certiorari</u>	162
s.126	application for <u>habeas corpus</u>	163
s.127	officer in charge defined	30
s.128	execution of warrant of arrest	30
s.129	arrest without warrant	31 - 32
s.130	use of force	32
s.131	immunity from civil liability	33 - 34
s.132	production of process	34
s.133	release after arrest by officer; cash bail by non-resident	35 - 39
s.134	person in custody to be brought before justice	39 - 42
s.135	expediting trial of person in custody	42, 164
s.136	appeal (from bail order)	43, 164
s.137	appointment of agent for appearance	43
s.138	recognizance binds for all appearances	44
s.139	application by surety to be relieved	44
s.140	delivery of defendant by surety	45
s.141	certificate of default	45
s.142	search warrant	47 - 55
s.143	detention of things seized	55 - 58, 165
s.144	examination or seizure of documents where privilege claimed	58 - 60
s.147	-- repeal of <u>Summary Convictions Act</u>	28
s.148	reference to <u>Summary Convictions Act</u>	28





